

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4 August Term 2005

5 (Argued: March 7, 2006 Decided: October 18, 2006)

6 Docket Nos. 04-4500-cv(L), 05-6343-cv(CON)

7 -----x
8 SR INTERNATIONAL BUSINESS INSURANCE CO., LTD.,

9 Plaintiff-Counter-Defendant-Appellee,

10 Copenhagen Reinsurance Co. Ltd., Employers Insurance
11 Company of Wausau, Federal Insurance Co., Great Lakes
12 Reinsurance PLC, Houston Casualty Co., Lexington
13 Insurance Company, Certain Underwriters at Lloyd's,
14 London Insurers, QBE International Insurance Limited,
15 and Württembergische Versicherung AG,

16 Counter-Defendant-Appellees,

17 -- v. --

18 WORLD TRADE CENTER PROPERTIES, LLC, Silverstein
19 Properties, Inc., Silverstein WTC Management Co., LLC, 1
20 World Trade Center LLC, 2 World Trade Center LLC, 4
21 World Trade Center LLC, 5 World Trade Center LLC, The
22 Port Authority NY/NJ, Westfield WTC, LLC, Westfield
23 Corporation, Inc., and Westfield America Inc.,

24 Defendants-Counter-Claimants-Appellants,

25 UBS Warburg Real Estate Investments, Inc., Wells Fargo
26 Bank Minnesota, N.A., As Trustee for the registered
27 holders of GMAC Commercial Mortgage Securities, Inc.,
28 Mortgage-Backed Pass-Through Certificates, Series 2001 -
29 WTC, and GMAC Commercial Mortgage Corporation,

30 Defendants-Counter-Claimants,

31 Gulf Insurance Company, Hartford Fire Insurance Company,
32 St. Paul Fire and Marine Insurance Company, Swiss
33 Reinsurance Co. UK Ltd., Tokio Marine and Fire Insurance
34 Co., Allianz Insurance Co., Royal Indemnity Co., TIG

1 Insurance Co., Zurich American Insurance Co., Industrial
2 Risk Insurers, The Travelers Indemnity Company, and Twin
3 City Fire Insurance Co.,

4 Counter-Defendants.

5 -----x

6 Docket Nos. 05-3167-cv(L), 05-3168-cv(CON), 05-3169-cv(CON),
7 05-3170-cv(CON), 05-3204-cv(CON), 05-3325-cv(CON),
8 05-3940-cv(CON), and 05-3942-cv(CON)

9 -----x

10 SR International Business Insurance Co., Ltd.,

11 Plaintiff-Counter-Defendant,

12 ALLIANZ INSURANCE CO., Gulf Insurance Company,
13 Industrial Risk Insurers, Royal Indemnity Co., TIG
14 Insurance Co., The Travelers Indemnity Company, Twin
15 City Fire Insurance Co., and Zurich American Insurance
16 Co.,

17 Counter-Defendants-Appellants,

18 -- v. --

19 WORLD TRADE CENTER PROPERTIES, LLC, Silverstein
20 Properties, Inc., Silverstein WTC Management Co., LLC, 1
21 World Trade Center LLC, 2 World Trade Center LLC, 4
22 World Trade Center LLC, 5 World Trade Center LLC, The
23 Port Authority NY/NJ, Westfield WTC LLC, Westfield
24 Corporation, Inc., and Westfield America, Inc.,

25 Defendants-Counter-Claimants-Appellees,

26 UBS Warburg Real Estate Investments, Inc., Wells Fargo
27 Bank Minnesota, N.A., As Trustee for the registered
28 holders of GMAC Commercial Mortgage Securities, Inc.,
29 Mortgage-Backed Pass-Through Certificates, Series 2001 -
30 WTC, and GMAC Commercial Mortgage Corporation,

31 Defendants-Counter-Claimants,

32 Copenhagen Reinsurance Co., Ltd., Employers Insurance
33 Company of Wausau, Federal Insurance Co., Great Lakes

1 Reinsurance PLC, Hartford Fire Insurance Company,
2 Houston Casualty Co., Lexington Insurance Company,
3 Certain Underwriters at Lloyd's, London, QBE
4 International Insurance Limited, Swiss Reinsurance Co.
5 UK Ltd., Tokio Marine and Fire Insurance Co., and
6 Württembergische Versicherung AG,

7 Counter-Defendants.

8 -----x
9 B e f o r e : WALKER, CABRANES and POOLER,
10 Circuit Judges.

11 Appellants, both insureds (holders of varying property
12 interests in the World Trade Center) and their insurers, appeal
13 adverse judgements of the United States District Court for the
14 Southern District of New York (Michael B. Mukasey, Chief Judge),
15 following a two-phase jury trial to adjudicate whether the
16 coordinated terrorist attacks of September 11, 2001, constituted
17 one or two "occurrences" under the terms of various insurance
18 contracts.

19 AFFIRMED.

20 HERBERT M. WACHTELL and ERIC M. ROTH,
21 Wachtell, Lipton, Rosen & Katz (Bernard W.
22 Nussbaum, Marc Wolinsky, Ben M. Germana, and
23 Gordon M. Mead, Jr., Wachtell, Lipton, Rosen
24 & Katz; John H. Gross, Proskauer Rose LLP, on
25 the brief), New York, New York, for World
26 Trade Center Properties LLC, Silverstein
27 Properties, Inc., Silverstein WTC Management
28 Co. LLC, 1 World Trade Center LLC, 2 World
29 Trade Center LLC, 4 World Trade Center LLC,
30 and 5 World Trade Center LLC.

31 Skadden, Arps, Slate, Meagher & Flom LLP
32 (Timothy G. Reynolds, New York, New York) and
33 The Port Authority of New York and New Jersey
34 (Megan Lee and Timothy G. Stickelman, New

1 York, New York), for The Port Authority of
2 New York and New Jersey.

3 Latham & Watkins LLP (Blair Connelly, New
4 York, New York; Peter K. Rosen, Los Angeles,
5 California; Maureen E. Mahoney, Washington,
6 D.C.; Kristine L. Wilkes, Laura A. Godfrey,
7 Robert S. Huie, Robert G. Knaier, and Colleen
8 C. Smith, San Diego, California, on the
9 brief), for Westfield WTC LLC, Westfield
10 Corporation, Inc., and Westfield America,
11 Inc.

12 BARRY R. OSTRAGER (Mary Kay Vyskocil, on the
13 brief), Simpson Thacher & Bartlett LLP, New
14 York, New York, for SR International Business
15 Insurance Co., Ltd.

16 Mendes & Mount, LLP (Leo W. Fraser, III, and
17 Christine M. McNicholas, New York, New York,
18 on the brief), for Copenhagen Reinsurance Co.
19 Ltd.

20 CHRISTOPHER S. FINAZZO (Robert F. Cossolini
21 and Michael Mernin, on the brief), Budd
22 Larner PC, Short Hills, New Jersey, for
23 Employers Insurance Company of Wausau.

24 THOMAS MCKAY, III (Stephen A. Cozen, Jacob C.
25 Cohn, and Michael A. Hamilton, on the brief),
26 Cozen O'Connor, P.C., Philadelphia,
27 Pennsylvania, for Federal Insurance Co.

28 STUART COTTON, Mound, Cotton, Wollan &
29 Greengrass, New York, New York, for Lexington
30 Insurance Company.

31 DAVID BOIES, Boies, Schiller & Flexner LLP
32 (Edward Normand, Boies, Schiller & Flexner
33 LLP, Armonk, New York; Kenneth W. Erickson,
34 Robert A. Skinner, and Bryan R. Diederich,
35 Ropes & Gray LLP, Boston, Massachusetts, on
36 the brief), Armonk, New York, for Certain
37 Underwriters at Lloyd's, London.

38 Baker & McKenzie, LLP (Grant Hanessian, New
39 York, New York, on the brief), for OBE
40 International Insurance Ltd.

1 LOUIS R. COHEN, Wilmer Cutler Pickering Hale
2 & Dorr LLP (Seth P. Waxman, Edward C. DuMont,
3 and Rachel Z. Stutz, Wilmer Cutler Pickering
4 Hale & Dorr LLP, Washington, D.C.; Catherine
5 M. Colinvaux, Zelle, Hofmann, Voelbel, Mason
6 & Gette LLP, Waltham, Massachusetts; John B.
7 Massopust, Richard L. Voelbel, Patricia St.
8 Peter, Adam P. Gislason, and Matthew J.
9 Gollinger, Zelle, Hofmann, Voelbel, Mason &
10 Gette LLP, Minneapolis, Minnesota, on the
11 brief), Washington, D.C., for Allianz
12 Insurance Company.

13 HARVEY KURZWEIL, Dewey Ballantine LLP (John
14 E. Schreiber, Michael Thelen, and Kathleen M.
15 Thompson, Dewey Ballantine LLP, New York, New
16 York; Robert J. Morrow, Hunton & Williams
17 LLP, New York New York, on the brief), New
18 York, New York, for Gulf Insurance Company
19 and Travelers Indemnity Company.

20 PHILIP A. SECHLER (John G. Kester and Carolyn
21 H. Williams, Zoe S. Poulson, Janet C. Fisher,
22 and Christina P. Giffin, on the brief),
23 Williams & Connolly LLP, Washington, D.C.,
24 for Industrial Risk Insurers.

25 MICHAEL H. BARR (Sandra D. Hauser, Edward J.
26 Reich, and Michael R. Galligan, on the
27 brief), Sonnenschein Nath & Rosenthal LLP,
28 New York, New York, for Royal Indemnity
29 Company.

30 Mound Cotton Wollan & Greengrass (Costantino
31 P. Suriano, on the brief), New York, New
32 York, for TIG Insurance Company.

33 Hogan & Hartson L.L.P. (William J. Bowman and
34 Joshua D. Weinberg, on the brief),
35 Washington, D.C., for Twin City Fire
36 Insurance Co.

37 O'Melveny & Myers LLP and Wiley Rein &
38 Fielding LLP (Paul R. Koepff, O'Melveny &
39 Myers LLP, New York, New York; Ira H.
40 Raphaelson, O'Melveny & Myers LLP,
41 Washington, D.C.; M. Evan Corcoran, Wiley
42 Rein & Fielding LLP, Washington, D.C., on the
43 brief), for Zurich American Insurance Co.

1 JOHN M. WALKER, JR., Circuit Judge:

2 These are appeals from judgments following two separate
3 phases of a jury trial to adjudicate whether the coordinated
4 terrorist attacks of September 11, 2001 - whereby two jetliners
5 separately crashed into the twin towers of the World Trade Center
6 ("WTC"), destroying both buildings - constituted one or two
7 "occurrences" under the terms of multiple insurance contracts.
8 The parties are entities with varying property interests in the
9 WTC (the "Silverstein Parties")¹ and the insurance companies they
10 retained to provide approximately \$3.5 billion in multi-layered
11 insurance on a "per occurrence" basis. At issue in the overall
12 litigation is whether the Silverstein Parties can recover in the
13 aggregate up to \$3.5 billion, for one occurrence, or up to \$7
14 billion, for two occurrences, under the terms of more than thirty
15 separate insurance contracts that together provide the total
16 coverage. The parties do not dispute that the destruction of the
17 WTC resulted in a loss that greatly exceeds \$3.5 billion.

18 The resolution of the broad question presented in these
19 appeals - whether the coordinated attacks constituted one or two

¹ The insureds include the Port Authority of New York and New Jersey, which owns the WTC property in fee simple, and Silverstein Properties, Inc. and several related entities. In 2001, Silverstein Properties was the successful bidder on a 99-year lease for the property from the Port Authority. Because Silverstein Properties is the party that actually obtained the insurance coverage at issue in this case and was the primary insured, for ease of reference we refer to all insureds as the "Silverstein Parties."

1 occurrences - is complicated by the fact that, as of September
2 11, 2001, the Silverstein Parties were still in the midst of
3 negotiating final property insurance coverage for the WTC.
4 Silverstein Properties had only recently entered into a long-term
5 lease for the WTC and, with one exception, none of the many
6 insurers that it had retained to provide property insurance
7 coverage had issued a final insurance policy. Instead, these
8 insurers had issued temporary binders or slips, which provide
9 interim insurance coverage until a final policy is either issued
10 or refused. Springer v. Allstate Life Ins. Co., 94 N.Y.2d 645,
11 649, 731 N.E.2d 1106, 1108 (2000). These fully enforceable,
12 interim insurance contracts or binders are a product of
13 necessity: They serve as a "quick and informal device to record
14 the giving of protection pending the execution and delivery of a
15 more conventionally detailed policy of insurance." Employers
16 Commercial Union Ins. Co. v. Firemen's Fund Ins. Co., 45 N.Y.2d
17 608, 613, 384 N.E.2d 668, 670 (1978); see also Springer, 94
18 N.Y.2d at 650 (noting that a binder and a final policy are "two
19 distinct agreements"). Because, in this case, the binders left
20 the term "occurrence" undefined, the resolution of the broad
21 question presented in these appeals required an individualized
22 inquiry to determine what each pair of parties - the insured
23 Silverstein Parties and each insurer - intended for the word
24 "occurrence" to mean in each binder.

1 In a previous opinion in this matter, we explained our
2 understanding of the nature of this individualized inquiry:

3 In deciding which terms are to be implied in a binder,
4 reliance may be placed on the extrinsic evidence of the
5 parties' pre-binder negotiations. In particular, we
6 believe that any policy form that was exchanged in the
7 process of negotiating the binder, together with any
8 express modifications to that form, is likely the most
9 reliable manifestation of the terms by which the
10 parties intended to be bound while the binder was in
11 effect. In the absence of such a policy form
12 underlying the negotiations or sufficient extrinsic
13 evidence of the negotiations to determine the parties'
14 intentions, the terms to be implied would likely be the
15 customary terms of the insurer's own form.

16 World Trade Ctr. Props., LLC v. Hartford Fire Ins. Co., 345 F.3d
17 154, 170 (2d Cir. 2003); see also id. at 169 ("To determine the
18 contents of a binder, New York courts generally look to (1) the
19 specific terms contained in the binder or incorporated by
20 reference, and (2) to the extent necessary as gap-fillers, the
21 terms included in the usual policy currently in use by the
22 insurance company [or those required by statute]."); cf. Lapenta
23 v. Gen. Accident Fire & Life Assurance Corp., 62 A.D.2d 1145, 404
24 N.Y.S.2d 182, 184 (4th Dep't 1978); see Sherri v. Nat'l Sur. Co.,
25 243 N.Y. 266, 269, 153 N.E. 70, 71 (1926); see also Ell Dee
26 Clothing Co. v. Marsh, 247 N.Y. 392, 396, 160 N.E. 651, 653
27 (1928).

28 There are two policy forms that could supply the missing
29 definition of "occurrence" in each insurance binder and, hence,
30 determine the amount of recovery to which the Silverstein Parties
31 are entitled: (1) the Silverstein Parties' proposed policy form,

1 which was prepared by the Silverstein Parties' insurance broker,
2 Willis of New York, and used during the negotiations with many of
3 the insurers (the "WilProp form"), or (2) the insurer's standard
4 policy form. In our previous opinion in this case, affirming the
5 grant of summary judgment to certain insurers, we held that the
6 WilProp form's definition of "occurrence," which aggregated and
7 treated as a single occurrence all losses or damages "attributable
8 directly or indirectly to one cause or to one series of similar
9 causes," contemplated a single-occurrence treatment of the
10 September 11 attacks. World Trade Ctr. Props., 345 F.3d at 180.
11 As a result of our previous holding, the Silverstein Parties are
12 only entitled to a single recovery in all instances where the
13 WilProp form supplies the definition of "occurrence."

14 For a large majority of insurers in this case, summary
15 judgment was not possible and, as a result, two principal
16 questions were left unresolved: (1) in each case where an insurer
17 claimed to have bound to the single-occurrence WilProp form,
18 whether the parties actually bound to that form; and (2) in each
19 of the remaining cases, whether the parties intended to issue
20 coverage based on a definition of occurrence that contemplated a
21 one- or two-occurrence treatment of the events of September 11.

22 To answer these questions, Chief Judge Mukasey of the United
23 States District Court for the Southern District of New York held
24 a two-phase jury trial: The first phase was designed to
25 determine which insurers bound to the WilProp form, and the

1 second was designed to determine the number of occurrences for
2 each insurer who did not bind to the WilProp form. A jury
3 determined that all but three of the insurers who participated in
4 Phase I bound to the single-occurrence WilProp form. At the
5 conclusion of the second phase of the trial, the jury determined
6 that each of the remaining insurers - the three insurers who were
7 found not to have bound to the WilProp form and six other
8 insurers who conceded that fact - bound coverage to contracts
9 that contemplated a two-occurrence treatment of the events of
10 September 11. The district court entered separate judgments in
11 favor of the prevailing insurers following Phase I and the
12 Silverstein Parties following Phase II.

13 We now entertain consolidated appeals filed by both the
14 Silverstein Parties, who lost at Phase I, and the insurers, who
15 lost at Phase II, in which they challenge the Phase I and II jury
16 verdicts, respectively. Finding no error that warrants setting
17 aside the judgments secured by the verdicts, we affirm.

18 **BACKGROUND**

19 In the spring of 2001, Silverstein Properties, Inc. was the
20 successful bidder on a 99-year lease for the WTC in lower
21 Manhattan. As a condition of the lease, the owner of the
22 property, the Port Authority of New York and New Jersey, required
23 Silverstein Properties to obtain insurance coverage, with the
24 Port Authority and other entities also named as insureds.

1 Silverstein Properties retained Willis of New York
2 ("Willis"), an international insurance brokerage firm, to
3 negotiate the placement of a multi-layered insurance program,
4 which consisted of a primary layer and eleven excess insurance
5 layers providing a total of \$3.54 billion in insurance coverage
6 on a "per occurrence" basis. Willis solicited insurers for the
7 placement by circulating a Property Underwriting Submission (the
8 "Underwriting Submission"). The Underwriting Submission
9 contained information regarding the proposed placement, including
10 descriptions of the property and the insureds, desired coverage
11 terms and conditions, estimated property values, engineering
12 information, and a property loss history. Also included within
13 the Underwriting Submission provided to many of the insurers was
14 a specimen copy of Willis's own "broker" form, the WilProp form,
15 which was intended to serve as a starting point for the parties
16 as they negotiated over a final policy form.

17 The WilProp form was designed to be pro-insured; it
18 contained a broad definition of "occurrence," which treated all
19 losses attributable to a "series of similar causes" as a single
20 "occurrence." By utilizing a broad definition of the term
21 "occurrence," the WilProp form served to limit the number of
22 deductibles that the insureds would have to pay in the event of a
23 loss. As the Silverstein Parties explain in their briefing to
24 this court, because "property insurance policies are written so

1 that both deductibles and policy limits are on a 'per occurrence'
2 basis[,] . . . it is normally in an insured's interest to be able
3 to lump together related events that would otherwise be deemed
4 separate occurrences into a single occurrence in order to avoid
5 absorbing multiple deductibles." Of course, this assumes a
6 claimed loss less than the "per occurrence" limit. Because the
7 terrorist attacks of September 11 resulted in a loss that greatly
8 exceeded the total one-occurrence limit of \$3.54 billion, the
9 pro-insured WilProp form has the perverse effect of favoring the
10 insurers in that it treats the events of September 11 as a single
11 "occurrence" and subjects any recovery under its terms to the
12 one-occurrence limit.

13 Over the summer of 2001, Willis submitted the WilProp form
14 to many of the insurers who ultimately bound coverage to the WTC
15 placement. Some of the insurers expressed reservations about
16 binding to the WilProp form. The precise nature of the insurers'
17 reservations - including whether any such reservations applied to
18 the binder period or whether they were limited to the parties'
19 obligations after a final policy was in place - is the subject of
20 a vigorous dispute between the parties. Again, assuming a
21 claimed loss less than the single-occurrence limit, it would be
22 in an insurer's interest to narrowly define the term "occurrence"
23 so as to require an insured to pay multiple deductibles for any
24 loss arising out of a series of related events. In the event
25 that a claimed loss exceeded the one-occurrence limit, however, a

1 narrow definition of "occurrence" would be disadvantageous to the
2 insurer; it could enable an insured to assert multiple claims for
3 any loss arising out of a series of related events and, as a
4 result, recover several times the one-occurrence limit.

5 By the end of July 2001, some of the insurers bound coverage
6 with the WilProp serving as the operative form during the binder
7 period, while other insurers bound coverage with their company
8 form serving as the governing form during the binder period.²

9 Because only one of these insurers, Allianz Insurance Co.
10 ("Allianz"), issued a final policy before the attacks of
11 September 11, for the vast majority of the insurers, the binders
12 serve as the operative contracts governing their obligations
13 following the destruction of the WTC.

14 On the morning of September 11, 2001, terrorists flew two
15 fuel-laden jetliners into the north and south towers of the WTC,
16 destroying both buildings and cutting short the lives of
17 thousands of people. A little over a month later, SR
18 International Business Insurance Co. filed suit against the

² There is no real dispute that some of the insurers bound coverage with the WilProp form serving as the governing form during the binder period. See World Trade Ctr. Props., 345 F.3d at 170-80 (affirming grants of summary judgment in favor of three insurers because there was no genuine dispute that the WilProp form governed during the binder period for these insurers). Because many of the Phase II insurers conceded that they had bound coverage to their own company forms, there also is no real dispute that some of the insurers bound coverage with their own policy forms serving as the governing form during the binder period.

1 Silverstein Parties, "seek[ing] a judicial declaration of its
2 rights and obligations to all of the insureds under [its
3 insurance] policy" and a "declaration that the damage to the
4 World Trade Center is one insurance loss." The Silverstein
5 Parties subsequently filed counterclaims against the other WTC
6 insurers, seeking a declaration "that the events of September 11
7 constituted more than one occurrence under the coverage that the
8 [insurers] agreed to provide to the Silverstein Parties." After
9 an initial assignment to another judge, the litigation was
10 assigned to Judge John S. Martin Jr. of the United States
11 District Court for the Southern District of New York for all
12 purposes.

13 Thereafter, the parties litigated various motions for
14 summary judgment. Over the course of adjudicating these motions,
15 Judge Martin held that three insurers - Hartford Fire Insurance
16 Company ("Hartford"), St. Paul Fire & Marine Insurance Company
17 ("St. Paul"), and a division of the Royal Indemnity Company,
18 Royal & SunAlliance's Risk Management & Global Division ("Royal
19 Global")³ - issued binders governed by the WilProp form and that,

³ Two divisions of Royal Indemnity Company, Royal Global and Royal Specialty Underwriting, Inc., issued separate binders in the WTC insurance program - based on separate negotiations. In our prior opinion in this matter, we determined that the binder issued by Royal Global was governed by the WilProp form. World Trade Ctr. Props., 345 F.3d at 174-78. The instant appeals include a challenge by Royal Specialty; the Phase II jury determined that Royal Specialty issued a binder that contemplated a two-occurrence treatment of the events of September 11.

1 under the definition of "occurrence" in that form, the
2 destruction of the WTC was one occurrence as a matter of law.
3 The district court entered final and appealable judgments in
4 favor of these insurers pursuant to Federal Rule of Civil
5 Procedure 54(b). The district court also denied a motion for
6 summary judgment filed by the Silverstein Parties, in which they
7 argued that the events of September 11, 2001, constituted two
8 occurrences as a matter of law under the undefined term
9 "occurrence" contained in the policy of another insurer, the
10 Travelers Indemnity Company ("Travelers"). The district court
11 certified as an appealable interlocutory order the denial of the
12 Silverstein Parties' motion for summary judgment. See 28 U.S.C.
13 § 1292(b).

14 The Silverstein Parties filed appeals from the Rule 54(b)
15 judgments and petitioned this court for leave to appeal the
16 certified interlocutory order pursuant to 28 U.S.C. § 1292(b).
17 We granted the Silverstein Parties' petition and their motion to
18 have the § 1292(b) appeal heard together with their separate
19 appeals from the Rule 54(b) judgments.

20 On September 26, 2003, we issued an opinion affirming the
21 judgments and order of the district court. World Trade Ctr.
22 Props., LLC v. Hartford Fire Ins. Co., 345 F.3d 154, 190 (2d Cir.
23 2003). We agreed with the district court that, with respect to
24 Hartford, St. Paul, and Royal Global, (1) the binders issued
25 before September 11 served as the operative contracts for these

1 insurers, see id. at 169, (2) these binders were governed by the
2 WilProp form, id. at 170-80, and (3) the destruction of the WTC
3 was one occurrence as a matter of law under the definition of
4 "occurrence" in the WilProp form, id. at 180. In reaching this
5 determination, we noted that, because the binders did not define
6 the term "occurrence," we would look to extrinsic evidence of the
7 parties' pre-binder negotiations. Id. at 170. Our review of
8 those negotiations supported the district court's conclusion that
9 Hartford, St. Paul, and Royal Global each issued binders governed
10 by the WilProp form's "single-occurrence" definition. See id. at
11 170-80.

12 The Silverstein Parties' certified interlocutory appeal
13 raised separate questions. That appeal was based on a two-step
14 argument. The Silverstein Parties first argued that, "where an
15 insurance policy uses the term 'occurrence' without defining the
16 term, then, as a matter of law, the term's meaning is not
17 ambiguous and must be decided by reference to well established
18 New York legal precedent"; they "further argue[d] that under the
19 definition of 'occurrence' established by New York law, the
20 events of September 11th constituted two occurrences as a matter
21 of law." Id. at 180 (emphasis added). We rejected these
22 arguments. Specifically, we held, among other things, that (1)
23 the Travelers binder served as the operative contract, id. at
24 183, (2) because the Travelers binder was an incomplete and
25 unintegrated contract, we could resort to extrinsic evidence to

1 determine the parties' intentions with respect to the undefined
2 term "occurrence," see id. at 184-85, (3) the undefined term
3 "occurrence" did not have a uniform meaning under New York law,
4 id. at 186, 188-89, and (4) "the meaning of 'occurrence' in the
5 Travelers binder is sufficiently ambiguous under New York law to
6 preclude summary judgment and to warrant consideration by [a]
7 fact finder of extrinsic evidence to determine the parties'
8 intentions," id. at 190.

9 Shortly after we issued our September 26 opinion, Judge
10 Martin retired from the judiciary after many years of
11 distinguished service. The WTC insurance litigation was
12 reassigned to Chief Judge Michael B. Mukasey of the United States
13 District Court for the Southern District of New York.

14 Chief Judge Mukasey structured a two-phase jury trial to
15 adjudicate the two principal factual disputes that remained
16 unresolved following our September 26 opinion: (1) in each case
17 where an insurer claimed to have bound to the "single-occurrence"
18 WilProp form, whether the parties actually bound to that form
19 (Phase I); and (2) in each of the cases where the WilProp form
20 was found or conceded not to govern, whether the parties intended
21 to issue coverage based on a definition of occurrence that
22 contemplated a one- or two-occurrence treatment of the events of
23 September 11 (Phase II). Twelve insurers and twenty Lloyd's-of-
24 London syndicates participated in Phase I. Six other insurers

1 chose not to participate in Phase I, conceding that their
2 coverage was not governed by the WilProp form.

3 At the end of Phase I, the jury found that nine of the
4 twelve participating insurers and all twenty of the Lloyd's
5 syndicates bound to the WilProp form. The remaining three
6 insurers, who were found not to have bound to the WilProp form,
7 had their claims adjudicated in Phase II along with the six
8 insurers who conceded that their coverage was not governed by the
9 WilProp form. The Phase II jury determined that all nine of
10 these insurers issued binders or, in the case of Allianz, a final
11 policy that contemplated a two-occurrence treatment of the events
12 of September 11. The district court rejected various motions and
13 entered final judgments in favor of the nine successful insurers
14 and the twenty Lloyd's syndicates following Phase I and the
15 Silverstein Parties following Phase II.

16 These appeals followed, in which the Silverstein Parties
17 challenge the judgments entered against them following Phase I
18 and the Phase II insurers challenge the judgments entered against
19 them following Phase II. We consolidated the parties' appeals
20 and heard oral argument in tandem.

21 **DISCUSSION**

22 The Silverstein Parties and the Phase II insurers present
23 parallel arguments on appeal. Both sides claim here, as they did
24 below, that they are entitled to judgment as a matter of law, and
25 both sides argue that, in any event, the judgments entered

1 against them were secured by a variety of evidentiary errors and
2 a mistaken set of jury instructions. Not surprisingly, however,
3 neither side admits that any errors contributed to the judgments
4 in their favor. As a result, we are led to believe that the same
5 types of error that would require us to set aside one set of
6 judgments are unfounded when it comes to the other set of
7 judgments - and vice versa.

8 We review de novo the denial of a motion for judgment as a
9 matter of law. Sanders v. New York City Human Res. Admin., 361
10 F.3d 749, 755 (2d Cir. 2004). "In doing so, however, [we] must
11 draw all reasonable inferences in favor of the nonmoving party,
12 and [we] may not make credibility determinations or weigh the
13 evidence." Reeves v. Sanderson Plumbing Prods., 530 U.S. 133,
14 150 (2000). Moreover, we "must disregard all evidence favorable
15 to the moving party that the jury is not required to believe."
16 Otero v. Bridgeport Hous. Auth., 297 F.3d 142, 151 (2d Cir. 2002)
17 (quotation marks omitted). "We [will] reverse [the denial of a
18 motion for judgment as a matter of law] only when there is 'such
19 a complete absence of evidence supporting the verdict that the
20 jury's findings could only have been the result of sheer surmise
21 and conjecture,' or where there is 'such an overwhelming amount
22 of evidence' in favor of the moving party that fair minded jurors
23 could not reasonably arrive at a verdict against the movant."
24 Sanders, 361 F.3d at 755 (quoting Phillips v. Bowen, 278 F.3d
25 103, 108 (2d Cir. 2002)).

1 We review a district court's evidentiary rulings under a
2 deferential abuse of discretion standard, United States v.
3 Fabian, 312 F.3d 550, 557 (2d Cir. 2002), and will not disturb
4 such rulings unless they are "manifestly erroneous," Luciano v.
5 Olsten Corp., 110 F.3d 210, 217 (2d Cir. 1997) (citation and
6 quotation marks omitted). In conducting our review, we are
7 mindful of the "wide latitude" that traditionally has been
8 afforded to district courts both in determining whether evidence
9 is admissible, Meloff v. New York Life Ins. Co., 240 F.3d 138,
10 148 (2d Cir. 2001) (citation and quotation marks omitted), and in
11 controlling "the mode and order" of its presentation to promote
12 the effective ascertainment of the truth, Fed. R. Evid. 611(a).

13 No error in either the admission or the exclusion of
14 evidence . . . is ground for granting a new trial or
15 for setting aside a verdict . . . unless refusal to
16 take such action appears to the court inconsistent with
17 substantial justice. The court at every stage of the
18 proceeding must disregard any error or defect in the
19 proceeding which does not affect the substantial rights
20 of the parties.

21 Fed. R. Civ. P. 61. "Whether an evidentiary error implicates a
22 substantial right depends on the likelihood that the error
23 affected the outcome of the case." Tesser v. Bd. of Educ. of
24 City Sch. Dist., 370 F.3d 314, 319 (2d Cir. 2004) (quotation
25 marks omitted). The moving party has the burden of showing that
26 "it is likely that in some material respect the factfinder's
27 judgment was swayed by the error." Id.

1 Finally, we review de novo a claim of error in the district
2 court's jury instructions and will set aside a judgment secured
3 by an erroneous charge "'only if the appellant shows that the
4 error was prejudicial in light of the charge as a whole.'" "
5 Caruolo v. John Crane, Inc., 226 F.3d 46, 56 (2d Cir. 2000)
6 (quoting Japan Airlines Co. v. Port Auth., 178 F.3d 103, 110 (2d
7 Cir. 1999)). "Jury instructions are erroneous if they mislead
8 the jury or do not adequately inform the jury of the law." Id.
9 It is axiomatic, however, that "a jury charge should be examined
10 in its entirety, not scrutinized strand-by-strand." Time, Inc.
11 v. Peterson Publ'g Co., 173 F.3d 113, 119 (2d Cir. 1999)
12 (citation and quotation marks omitted).

13 **I. Phase I Appeals**

14 The issue before the Phase I jury was whether the
15 participating insurers issued binders governed by the WilProp
16 form, which we have already held requires a one-occurrence
17 treatment of the events of September 11. World Trade Ctr.
18 Props., 345 F.3d at 180. The Phase I insurers are twelve
19 insurance companies and twenty Lloyd's syndicates who claim to
20 have bound to the single-occurrence WilProp form. They can be
21 divided into three groups: (1) London insurers (the twenty
22 Lloyd's syndicates and five other London-based and European
23 insurers (Copenhagen Reinsurance Co. ("Copenhagen Re"), Great
24 Lakes Reinsurance PLC ("Great Lakes"), Houston Casualty Co.
25 ("Houston Casualty"), QBE International Insurance Ltd. ("QBE"),

1 and Württembergische Versicherung AG ("Württ")), (2) SR
2 International Business Insurance Co. ("Swiss Re"), and (3) six
3 domestic insurers (Federal Insurance Co. ("Federal"), Lexington
4 Insurance Co. ("Lexington"), Royal Specialty Underwriting, Inc.
5 ("Royal Specialty"), Twin City Fire Insurance Co. ("Twin City"),
6 Employers Insurance of Wausau ("Wausau"), and Zurich American
7 Insurance Co. ("Zurich")). The Phase I jury found that nine of
8 the twelve insurers and all twenty of the Lloyd's syndicates
9 issued binders governed by the one-occurrence WilProp form. The
10 jury found that three of the twelve insurers did not bind to the
11 WilProp form. These insurers (Zurich, Royal Specialty, and Twin
12 City) did not appeal the Phase I verdicts and were tried in Phase
13 II along with six more insurers who conceded that they did not
14 bind to the WilProp form.

15 On appeal, the Silverstein parties assert three principal
16 arguments with respect to the adverse judgments secured by the
17 Phase I verdicts; they argue that they are entitled to (1)
18 judgment as a matter of law against the London insurers, Swiss
19 Re, and Federal; (2) a new trial as to all of the insurers based
20 on prejudicial evidentiary errors; and (3) a new trial as to all
21 of the insurers based on errors in the district court's charge.
22 The Silverstein Parties also assert a variety of subsidiary
23 arguments, which do not warrant formal treatment in this opinion.
24 We turn to their principal arguments.

25 **A. Judgment as a Matter of Law**

1 As an initial matter, the Silverstein Parties argue that the
2 question whether the London insurers, Swiss Re, and Federal bound
3 to the WilProp form should have never reached a jury. They
4 contend that there is overwhelming evidence that these insurers
5 did not bind to the WilProp form, either because of the actions
6 of these insurers or the language that they placed in their
7 binders. We reject these arguments: The Silverstein Parties
8 ignore unfavorable evidence and rely on inferences and
9 assumptions that the jury was not required to make.

10 **1. London Insurers**

11 The Silverstein Parties contend that all but one of the
12 London insurers issued "slips" (the European equivalent to
13 binders), which contained language that unambiguously negates an
14 intent on the part of those insurers to bind to the WilProp form.
15 The language at issue provides:

16 FORM: J(A) and/or Companies Insurance Policy plus
17 Wording as per Co-insurers'. Agreement of
18 wording waived.⁴

4 The quoted portion of the slip appears in a section of the document containing information about the insured's coverage. The information is presented in two columns. In the first column are various categories, or fields. The categories, in succession, are "TYPE," "FORM," "INSURED," "ADDRESS," "PERIOD," "INTEREST," "SUM INSURED," "SITUATION," "CONDITIONS," "PREMIUM," "US CLASSIFICATION," "COMMISSION," "INFORMATION," and "PROGRAM SUBLIMITS." In the other column (to the right of each category) is relevant information corresponding to each field. The abbreviation "J(A)," which appears in the quoted portion of the slip, stands for "Jacket Agreement."

1 The Silverstein Parties argue that the wording "FORM: . . .
2 Agreement of wording waived" manifests an intent on the part of
3 the London insurers not to issue slips governed by the WilProp
4 form. We disagree.

5 There are a variety of explanations for this language, any
6 one of which is sufficient to defeat the Silverstein Parties'
7 claim to judgment as a matter of law. As an initial matter, the
8 Silverstein Parties' argument relies on the assumption that the
9 "FORM" section applies to the binder period. It is equally
10 plausible that this section was intended only to apply to the
11 final policy form. Under this alternative reading, the London
12 insurers simply expressed their intention to waive their consent
13 to the final policy wording but were willing to bind immediately
14 to the WilProp form. In our prior opinion in this matter, we
15 explained that "the fact that an insurer . . . demonstrated an
16 intention to be bound by the final policy form as ultimately
17 negotiated by [another insurer] would be relevant only to the
18 parties' post-binder relationship, which is of no import to this
19 case." World Trade Ctr. Props., 345 F.3d at 170.

20 The Silverstein Parties argue that reading the "FORM"
21 section to apply only to the final policy period "defies common
22 sense" because it means that the London "insurers were somehow
23 willing to give up any say as to what policy form would
24 ultimately govern their risk once the formal policy issued, but
25 nonetheless were requiring that the WilProp form apply during the

1 slip period." Again, we disagree. As the London insurers
2 explain, it is equally plausible that "[t]hey were . . . prepared
3 to waive their rights to agree [to the final policy] form because
4 . . . other capable co-insurers would do that work" for them.⁵
5 Moreover, another section of the slips, entitled "INFORMATION",
6 deemed to have been read and incorporated into the slips:
7 "Underwriting data on file with Willis Limited." A reasonable
8 jury could have concluded that this section governed the binder
9 period and incorporated Willis's Underwriting Submission, which
10 included the WilProp form.

11 Even if we were to assume that the "FORM" section does apply
12 to the interim binder period - an assumption that we are not
13 entitled to make in reviewing the denial of a motion for judgment
14 as a matter of law - it is also possible that the language
15 "wording as per Co-insurers" indicates an intent on the part of
16 the London insurers to bind to the same form to which many of
17 their co-insurers had bound: the WilProp form. These
18 explanations, which a reasonable jury could have accepted, are
19 sufficient to defeat the Silverstein Parties' claim to judgment
20 as a matter of law against the London insurers.

⁵ The London insurers did not participate to the same extent as other insurers (collectively, the twenty-five London-based insurers provided approximately twenty percent of the total coverage); it is perfectly reasonable that these insurers would have been willing to waive their consent to a final policy form and instead accept the wording negotiated by a more deeply involved co-insurer, such as Swiss Re, who alone provided approximately twenty-five percent of the total coverage.

1 **2. Swiss Re**

2 With respect to Swiss Re, the Silverstein Parties argue that
3 they are entitled to judgment as a matter of law because there is
4 overwhelming evidence that Swiss Re rejected the WilProp form.
5 This argument is based chiefly on three discrete facts: (1) the
6 operative slip that governed Swiss Re's obligations was issued on
7 July 26, 2001, (2) the July 26 slip was exchanged as an e-mail
8 attachment along with a copy of the Travelers form, not the
9 WilProp form, and (3) there is no evidence that Swiss Re did
10 anything thereafter to reject the Travelers form or incorporate
11 the WilProp form into the governing slip.

12 The Silverstein Parties' argument, however, ignores other
13 evidence before the jury, including evidence that Swiss Re
14 initially bound to a slip issued on July 9, which was governed by
15 the WilProp form, and that Swiss Re was unaware that Willis had
16 replaced the WilProp form with the Travelers form when Swiss Re
17 re-executed the slip on July 26. Specifically, a reasonable jury
18 could have found that (1) Willis included within its solicitation
19 to Swiss Re a copy of the WilProp form; (2) during the period
20 prior to binding coverage, Swiss Re and Willis actively
21 negotiated specific provisions contained in the WilProp form; (3)
22 on July 6, Willis forwarded to Swiss Re a slip and appended the
23 WilProp form; (4) on July 9, Swiss Re executed the July 6 slip;
24 (5) on July 18, Swiss Re's WTC coverage became effective with the
25 WilProp serving as the governing form; (6) on July 23, Willis

1 forwarded to Swiss Re an e-mail with a revised slip and included
2 an unspecified document labeled "form," which was appended to the
3 e-mail as an attachment; (7) during a telephone conversation on
4 July 23, Willis did not inform Swiss Re that it had attached a
5 new form, the Travelers form, to the e-mail instead of the
6 WilProp form; (8) on July 26, Swiss Re executed the revised slip;
7 and (9) even though the Travelers form was the unspecified form
8 that was attached to the July 23 e-mail, Swiss Re was unaware of
9 this fact and believed that the form was intended only to
10 memorialize certain handwritten modifications that it had made to
11 the July 9 slip, not to change the form that governed during the
12 binder period.

13 Based on these facts, the Silverstein parties are not
14 entitled to judgment as a matter of law against Swiss Re. Daniel
15 Bollier, the Swiss Re employee who negotiated the slip, testified
16 unequivocally that he did not assign any significance to the
17 Travelers form, which had been appended to the same July 23 e-
18 mail that included the revised slip. He testified that he opened
19 and scanned through the form on his computer but did not believe
20 that it related "to the Silverstein risk." He further testified
21 that he believed the form to be a "resending of the WilProp
22 coverage form." A jury was entitled to credit this testimony and
23 conclude that Swiss Re did not assent to change the form after it
24 already had bound to the WilProp form.

1 Undeterred, the Silverstein Parties argue that they are
2 entitled to judgment as a matter of law for two principal
3 reasons. They argue that (1) Bollier rejected the WilProp form
4 as a matter of law during the pre-binder negotiations, and (2) in
5 any event, the July 26 slip (with the attached Travelers form)
6 superceded the previous slip (with the WilProp form). The
7 Silverstein Parties' arguments are without merit. The jury was
8 entitled to find that Bollier did not reject the WilProp form
9 during the pre-binder negotiations, and it was likewise entitled
10 to find that, after binding to the WilProp form, Swiss Re never
11 gave its assent to change to the Travelers form.

12 **3. Federal**

13 The Silverstein Parties also argue that they are entitled to
14 judgment as a matter of law against Federal, because the plain
15 language of Federal's binder negates any intent to bind to the
16 WilProp form. This argument relies on select pieces of evidence
17 and ignores disputed issues properly committed to the jury; we
18 reject their argument accordingly.

19 In soliciting Federal's participation on the WTC placement,
20 Timothy Boyd of Willis sent Federal's underwriter, Carmela
21 O'Neal, a proposed binder and a copy of the WilProp form. On the
22 afternoon of July 10, 2001, O'Neal sent three e-mails to Boyd,
23 authorizing Federal's participation in the WTC program. On July
24 18, after a series of negotiations as to the layer that Federal

1 would be participating in and the amount of coverage that it
2 would be providing, O'Neal confirmed that coverage had been bound
3 and issued Boyd a policy number.

4 There was evidence before the jury that after Federal bound
5 coverage the parties wished to formalize their relationship. On
6 July 20, 2001, Boyd sent O'Neal a proposed document entitled
7 "Binder of Insurance." O'Neal responded by indicating that she
8 had several problems with the proposed binder. In response, Boyd
9 promised to send O'Neal a revised binder.

10 Roughly one week later, Boyd and O'Neal spoke. Boyd was
11 looking for the signed formal binder, but O'Neal reminded him
12 that he had promised to send her a revised binder. Boyd stated
13 that he had not sent the revision because other carriers,
14 including Travelers, were still making form changes. O'Neal
15 testified that in order to expedite the process, she agreed to
16 make handwritten modifications to the previous binder.

17 The Silverstein Parties contend that these handwritten
18 changes establish, as a matter of law, that Federal did not
19 intend to bind to the WilProp. O'Neal inserted at the end of the
20 binder: "Subject to manuscript form wording to be agreed. Best
21 terms and conditions apply." Based on this modification, the
22 Silverstein Parties contend that "O'Neal made manifest on the
23 face of the binder her intent not then and there to be agreeing
24 to any particular form but rather to leave for future agreement

1 the policy form that would govern Federal's coverage." In
2 response, Federal argues that the "Silverstein [parties] cannot
3 show that their proffered interpretation of the binder is the
4 'only one permitted by the evidence.'" Federal continues, "To
5 the contrary, the evidence showed that O'Neal bound Federal's
6 coverage to WilProp, and did so nearly two weeks before O'Neal
7 marked-up, signed and returned the 'formal' Willis binder form."

8 We are persuaded by Federal's argument. Based on the
9 evidence of the parties' negotiations, the jury was entitled "to
10 find that O'Neal's reference to 'manuscript form wording to be
11 agreed' concerned the negotiation of the final policy form and
12 had no bearing upon the coverage provided temporarily by
13 Federal's binder based upon the WilProp form." Federal Br. 18.
14 "The jury also was entitled to find that the reference to 'best
15 terms and conditions' likewise pertained to the final policy . .
16 . ." Id. This explanation is not inconsistent with our
17 understanding of the law:

18 "[T]he terms of a binder are not left to future
19 negotiation. The law of New York with respect to
20 binders does not look to the negotiations of the
21 parties to see what terms might ultimately have been
22 incorporated into a formal policy." SR Int'l Bus. Ins.
23 Co. v. World Trade Ctr. Props., LLC ("Hartford
24 Decision"), 222 F. Supp. 2d 385, 388-89 (S.D.N.Y.
25 2002). Rather, the negotiations are examined to
26 determine what terms the parties intended to
27 incorporate into the binder.

28 World Trade Ctr. Props., 345 F.3d at 169 (emphasis added)

29 (alteration and ellipsis omitted) (citation altered); see also

1 id. at 170 (“[T]he fact that an insurer . . . demonstrated an
2 intention to be bound by the final policy form as ultimately
3 negotiated by [another insurer] would be relevant only to the
4 parties’ post-binder relationship, which is of no import to this
5 case.”).

6 Because the Silverstein parties’ interpretation of the
7 parties’ negotiations is not the “only one permitted by the
8 evidence,” This Is Me, Inc. v. Taylor, 157 F.3d 139, 145 (2d Cir.
9 1998), it cannot support their argument for judgment as a matter
10 of law. A reasonable jury could find that (1) Federal bound to
11 the WilProp and (2) it never agreed to change the form that
12 governed during the binder period.

13 **B. Evidentiary Challenges**

14 The Silverstein Parties argue that numerous evidentiary
15 errors, in both the admission and exclusion of evidence,
16 contributed to the jury’s adverse verdicts and entitle them to a
17 new trial as to each of the Phase I appellee-insurers. Only two
18 of these alleged errors warrant formal treatment in this opinion:
19 (1) whether the district court abused its discretion in excluding
20 London-based custom and usage evidence, and if so, whether that
21 error was prejudicial; and (2) whether the district court abused
22 its discretion in admitting evidence of the London insurers’
23 uncommunicated subjective intent, and if so, whether that error
24 was prejudicial.

25 **1. Exclusion of London Custom and Usage Evidence**

1 At trial, the Silverstein Parties "sought to introduce a
2 wealth of custom and usage evidence showing that in the London
3 insurance market brokers and underwriters who intend to
4 incorporate a particular policy form into a slip do so by
5 specifying that form on the slip by name or other 'unique
6 reference' . . . and that this failure of designation [in the
7 London insurers' slips] coupled with the slips' language of
8 waiver signified that the London insurers had not bound to
9 WilProp." Silverstein Parties' Br. 71. The district court
10 excluded this evidence, based chiefly upon a concern that it
11 might conflict with our prior decision in this matter. The
12 district court appears to have reasoned that, because, under New
13 York law, a party need not specifically reference a form on a
14 binder in order to bind to that form, see World Trade Ctr.
15 Props., 345 F.3d at 169-70, evidence that the London insurers
16 must - as a matter of custom - specifically refer to a form by
17 name on the slip in order to bind to that form would contradict
18 New York law. Cf. Uribe v. Merchants Bank of N.Y., 91 N.Y.2d
19 336, 342, 693 N.E.2d 740, 744 (1998) (holding that the specific
20 customs and practices of a particular industry "should not be
21 imputed to the average merchant and should not supersede the more
22 generally applicable rules" that governed the interpretation of
23 the contract at issue).

24 As we understand their argument, the Silverstein Parties
25 sought to establish that, because the London insurers did not

1 follow their ordinary practice, which was to specifically refer
2 to a form by name on the slip, that evidence suggests that the
3 London insurers did not intend to bind to the WilProp form. We
4 agree that evidence that the London insurers did not follow a
5 market custom and practice is relevant to determining the
6 parties' intent. Cf. World Trade Ctr. Props., 345 F.3d at 186
7 ("[W]e have specifically instructed courts to consider the
8 'customs, practices, usages and terminology as generally
9 understood in the particular trade or business' in identifying
10 ambiguity within a contract . . . [a]nd New York courts have long
11 held that such evidence is admissible for purposes of construing
12 an insurance binder." (citations omitted)). The district court,
13 however, showed sensitivity to this portion of the Silverstein
14 Parties' argument. Chief Judge Mukasey asked the London
15 insurers' counsel, "If your clients testify to what they expected
16 or believed [their actions to mean], why can't they be cross-
17 examined on what in fact goes on in the market in which they
18 function?" In the end, Judge Mukasey appears to have balanced
19 these competing interests - the need to permit extrinsic evidence
20 of the parties' intent with the desire to exclude evidence that
21 might be viewed as superceding New York law - by precluding the
22 Silverstein Parties from submitting direct evidence of London-
23 based custom and practice but permitting the Silverstein Parties
24 to cross-examine the London insurers' witnesses on this point.

1 In our opinion, the district court did not abuse its discretion in
2 structuring the admission of the evidence in this way.

3 Moreover, even if it was error to exclude the Silverstein
4 Parties' direct evidence of London-based custom-and-practice, the
5 error did not "affect [their] substantial rights." Fed. R. Civ.
6 P. 61. The Silverstein Parties cross-examined a London insurers'
7 witness on the customs and practices of the London-based
8 insurers, during which they asked specific questions based on a
9 document that purportedly memorialized the London-based insurers'
10 practice of referring to a form by name on the slip. The
11 Silverstein Parties also argued in summation that the failure to
12 follow the alleged practice of specifically referring to a form
13 by name on the slip tended to negate the London insurers' intent
14 to bind to WilProp: "Blackmore, Lawrence have told you that . .
15 . if the underwriter or broker has an intent to bind to a
16 particular policy form, what you do is you say it right in the
17 form section of the slip itself." We believe that any error in
18 excluding the Silverstein Parties' direct evidence of custom and
19 practice was harmless.

20 **2. Admission of Subjective Intent Evidence**

21 The Silverstein parties argue that the district court abused
22 its discretion when it permitted several of the insurers'
23 witnesses to testify as to which form they thought they had bound
24 to during the course of the parties' negotiations. They contend

1 that this testimony should have been excluded as impermissible
2 evidence of the insurers' uncommunicated subjective intent. They
3 further contend that the admission of "such self-serving
4 testimony constituted prejudicial error and requires a new
5 trial."

6 "The cardinal principle for the construction and
7 interpretation of insurance contracts - as with all contracts -
8 is that the intentions of the parties should control." Newmont
9 Mines Ltd. v. Hanover Ins. Co., 784 F.2d 127, 135 (2d Cir. 1986).
10 Under New York law, this is accomplished by looking to "the
11 objective manifestations of the intent of the parties as gathered
12 by their expressed words and deeds." Brown Bros. Elec.
13 Contractors, Inc. v. Beam Constr. Corp., 41 N.Y.2d 397, 399, 361
14 N.E.2d 999, 1001 (1977). The parties' communicated expressions
15 are interpreted objectively to give effect to the "'reasonable
16 expectations'" of the parties, not necessarily their actual
17 expectations. Id. at 400; see also Mencher v. Weiss, 306 N.Y. 1,
18 7, 114 N.E.2d 177 (1953) ("[T]he manifestation of a party's
19 intention rather than the actual or real intention is ordinarily
20 controlling."). Thus, it has been said that "the existence of a
21 binding contract is not dependent on the subjective intent of
22 either [party]." Brown Bros. Elec., 41 N.Y.2d at 399.

23 Although a party's uncommunicated subjective intent cannot
24 supply the ultimate meaning of an ambiguous contract, it is quite
25 another thing to hold that such evidence is wholly irrelevant and

1 inadmissible for other purposes. Cf. Fed. R. Evid. 401 (stating
2 that evidence is relevant if it has "any tendency to make the
3 existence of any fact that is of consequence to the determination
4 of the action more probable or less probable than it would be
5 without the evidence" (emphasis added)); Kabil Devs. Corp. v.
6 Mignot, 279 Or. 151, 157, 566 P.2d 505, 508 (1977). Under the
7 objective theory of contract, the parties' "'reasonable
8 expectations'" are determined based on an objective understanding
9 of the "attendant circumstances [in which the agreement was
10 made], the situation of the parties, and the objectives they were
11 striving to attain." Brown Bros. Elec., 41 N.Y.2d at 400
12 (citations omitted); see also Rudman v. Cowles Commc'ns, Inc., 30
13 N.Y.2d 1, 11, 280 N.E.2d 867 (1972) (stating that, when a
14 contract is ambiguous, "the court may and should look to the
15 prior negotiations [of the parties] to determine what was
16 intended"); Kitching v. Brown, 180 N.Y. 414, 420, 73 N.E. 241
17 (1905) ("One of the familiar rules applicable to the
18 interpretation of ambiguous covenants and agreements is to
19 ascertain, as nearly as may be, the situation of the parties,
20 their surroundings and circumstances, the occasion and apparent
21 object of their stipulations, and from all these sources to
22 gather the meaning and intent of their language."). At least
23 with respect to a negotiated agreement, a party's subjective
24 understanding, while not controlling, may shed light on the state
25 of those negotiations and could bear on that party's objective

1 actions. See Kabil, 279 Or. at 158 (stating that "a factfinder
2 might well believe that what a party thought he was doing would
3 show in what he did").

4 In this case, the jury was asked to determine whether the
5 parties intended for the WilProp form to govern during the binder
6 period. Cf. Underwood v. Greenwich Ins. Co., 161 N.Y. 413, 423,
7 55 N.E. 936 (1900) (stating that parol proof of the parties'
8 intentions was permissible in order to supply the terms of an
9 unintegrated and incomplete insurance binder). We think that the
10 insurers' subjective understandings were relevant insofar as they
11 provided the jury with an understanding of the state of the
12 parties' negotiations and helped to explain the parties' overt
13 actions. See, e.g., World Trade Ctr. Props., 345 F.3d at 171
14 (relying on the testimony of one of the insurer's witnesses, who
15 stated that he "understood the WilProp form was only a draft and
16 would ultimately require amendment"). For example, the fact that
17 an insurer thought that it had bound to the WilProp form might
18 help to explain the changes that it made to the interim binder.
19 As a result, we conclude that the district court did not abuse
20 its discretion when it permitted some of the insurers' witnesses
21 to testify as to which form they thought that they had bound, "as
22 long as the jury was not misled into treating this testimony, in
23 its context, as something more than evidence bearing on the
24 behavior and the perceptions of the parties to the negotiation."
25 Kabil, 279 Or. at 158.

1 We do not believe that the jury was so misled in this case.

2 The district court gave an appropriate limiting instruction:

3 A party's intent that is not communicated to the other
4 party has no bearing; only the intent indicated by
5 words and acts that are made known to the other party
6 may be considered. You may recall that I permitted
7 some witnesses to testify about their own understanding
8 and assumptions about certain events even though they
9 did not communicate those understandings and
10 assumptions to another party. That testimony was
11 received only to help explain the witness's own actions
12 and statements. However, a witness's own
13 understandings that are not communicated to another
14 party cannot change the meaning of statements and acts
15 that are communicated to that other party.

16 Accordingly, we reject the Silverstein parties' claims of error
17 regarding subjective intent evidence.⁶

18 **C. Jury Instruction Claims**

19 The Silverstein Parties also argue that the district court's
20 jury instructions were legally deficient and contributed to the
21 verdicts secured by the insurers. These arguments are without
22 merit.

23 **1. Claimed Instructional Errors as to the London**
24 **Insurers**

⁶ The Silverstein Parties cite to only one case where a New York state court, faced with interpreting an ambiguous term, deemed inadmissible evidence of a party's subjective intent. See Rickerson v. Hartford Fire Ins. Co., 149 N.Y. 307, 314-15, 43 N.E. 856 (1896). The Rickerson court, however, did not address whether such evidence was inadmissible for all purposes. See id. It simply held, consistent with the district court's instruction in this case, that it was error to interpret the ultimate meaning of an ambiguous term based on a party's uncommunicated subjective intent. Id. at 313-14, 315. We do not read Rickerson as precluding evidence that would tend to aid a factfinder in understanding the parties' negotiations.

1 At trial, the Silverstein parties argued to the jury that
2 none of the London insurers bound to the WilProp form. They
3 asserted that, if the jury found that no form governed, then it
4 was likely that the insurers' customary form would serve as a gap
5 filler. Cf. World Trade Ctr. Props., 345 F.3d at 170 ("In the
6 absence of [an exchanged] policy form underlying the [parties']
7 negotiations or sufficient extrinsic evidence of the negotiations
8 to determine the parties' intentions, the terms to be implied
9 would likely be the customary terms of the insurer's own form.").
10 The Silverstein Parties argue on appeal that the district court's
11 charge effectively precluded the jury from reaching this result.
12 "[N]ot only did the district court refuse to charge the jury that
13 the parties need not agree upon a particular form at the time of
14 binding," the Silverstein Parties contend, "it then compounded
15 the error by instead charging the jury that '[a] binder's
16 coverage terms are typically governed by a particular policy
17 form.'" The Silverstein Parties argue that by instructing the
18 jury that binders are "typically governed by a particular policy
19 form," the district court in effect instructed the jury that it
20 would be "atypical" for an insurer not to bind coverage on any
21 particular form.

22 When read in full, however, the district court's charge did
23 not negate the Silverstein Parties' "no form" argument or
24 contradict New York law. The district court's charge was
25 consistent with the standard we announced in our prior opinion.

1 Compare Appx. 6848 ("A binder's coverage terms are typically
2 governed by a particular policy form."), with World Trade Ctr.
3 Props., 345 F.3d at 170 ("[W]e believe that any policy form that
4 was exchanged in the process of negotiating the binder, together
5 with any express modifications to that form, is likely the most
6 reliable manifestation of the terms by which the parties intended
7 to be bound while the binder was in effect."). Contrary to the
8 Silverstein Parties' argument, the district court did not
9 preclude their "no form" or "gap filler" argument; it
10 specifically charged the jury: "In the absence of such a policy
11 form underlying the negotiations or enough other evidence of the
12 negotiations to determine the parties' intentions, the terms to
13 be implied would likely be the customary terms of the insurance
14 company's own form, unless there is evidence indicating that an
15 understanding existed between the parties that a different policy
16 form would apply to the binder and that the insurance company was
17 aware of its terms." Cf. World Trade Ctr. Props., 345 F.3d at
18 170 ("In the absence of such a policy form underlying the
19 negotiations or sufficient extrinsic evidence of the negotiations
20 to determine the parties' intentions, the terms to be implied
21 would likely be the customary terms of the insurer's own form,
22 unless there is evidence indicating that an understanding existed
23 between the parties that a different policy form would apply to
24 the binder and that the insurer was aware of its terms."). We
25 reject the Silverstein Parties' argument that the district

1 court's charge precluded their "no form" or "gap filler" theory.
2 In particular, Judge Mukasey's statements to the jury that a
3 "binder's terms are typically governed by a particular form," and
4 that "the terms to be implied would likely be the customary terms
5 of the insurance company's own form," indicate that the district
6 court's instruction merely limited - pursuant to our previous
7 case law - the circumstances under which a "no form" or "gap
8 filler" theory would plausibly apply. As suggested by the
9 judge's use of the words "typically" and "likely," the charge did
10 not categorically preclude the applicability of such theories to
11 the case.

12 **2. Claimed Instructional Errors as to Swiss Re**

13 The Silverstein Parties next argue that the district court's
14 charge as to Swiss Re was deficient in two respects. First, the
15 Silverstein parties assert - as they do against all the insurers
16 - that the district court's charge as to a "no form" or "gap
17 filler" possibility was legally deficient and prejudicial. For
18 the reasons stated above, we reject this argument.

19 Second, the Silverstein Parties argue that the district
20 court's charge did not account for the possibility that Willis
21 withdrew the WilProp form prior to Swiss Re's acceptance of that
22 form. The district court, however, instructed the jury:

23 The parties agreed to a particular form if they both
24 intended at the moment their agreement as to form was
25 incorporated into the binder, that that form would
26 govern. A party may offer certain terms and then
27 withdraw these terms. If they are withdrawn before the

1 other party accepts them, then they are of no effect.
2 However, if terms are accepted before they are
3 withdrawn, they cannot be changed or withdrawn unless
4 the party that accepted them agrees to the change or
5 withdrawal.

6 The Silverstein parties fault this instruction as legally
7 deficient because it was not in the section entitled "Changing
8 from the Original Form." But as the district court recognized,
9 in order to be in the "Changing from the Original Form" section,
10 the jury had to first find that there was an initial agreement as
11 to form. By its terms, the "Changing from the Original Form"
12 section only applies where the parties have already agreed to a
13 particular form.

14 In full, the "Changing from the Original Form" section of
15 the charge provided:

16 Where the parties have agreed to a binder that
17 includes an agreement that a particular policy form
18 will govern the terms of coverage, the party may later
19 decide to change the binder by agreeing to use a
20 different form. In order to change to a different
21 policy form, both parties must agree to the change.
22 The standard for determining whether the parties agreed
23 to change to a different policy form is the same as the
24 standard for determining whether the parties agreed to
25 use a particular policy form in the first place.

26 If one party suggests changing to a different
27 form, the binder does not change unless the other party
28 agrees to use the different form. If the other party
29 remains silent, then that party has not agreed to
30 change unless its silence would have a tendency to
31 mislead the party that suggested the change. On the
32 other hand, the other party may agree, by words or
33 actions, to switch to the new form even if that party
34 has received but not read the form, but only if that
35 party has also been given fair notice of the existence
36 and availability of the form for review.

1 Similarly, you may find, if you believe that the
2 evidence justifies it, that the parties simply agreed
3 that the initial form would no longer govern without
4 necessarily agreeing on which form would govern in its
5 place. In that event, the parties' agreement would be
6 governed by the same rule that applies when there is
7 not enough evidence to determine the parties'
8 intention, as described on page 15 of these
9 instructions.

10 Although the jury expressed some confusion as to one aspect
11 of the "Changing from the Original Form" section, it did not
12 relate to the possibility that Willis withdrew the WilProp form
13 prior to acceptance by Swiss Re. Instead, the jury focused on
14 the second paragraph of the "Changing from the Original Form"
15 section. Specifically, the jury asked:

16 Request for clarification of Jury Charge, p. 18,
17 paragraph starting "If one party suggests . . ." ending
18 "availability of the form for review."

19 The jury is in disagreement as to what this
20 paragraph means. What is the implication of a party
21 remaining silent? What does "unless its silence would
22 have a tendency to mislead the party" mean? And does
23 just getting the form, and remaining silent, constitute
24 agreement to the form? We're hung up on Exh. A 1 and
25 whether or not that is an indication of an intent to
26 switch form. Can you be deemed to agree to a change in
27 form while remaining silent?

28 Exhibit A 1 was a copy of the July 23 e-mail from Willis to Swiss
29 Re, which included two attachments: a copy of the revised slip
30 and an unspecified "form." As we have already explained, the
31 unspecified form turned out to be the Travelers form.

32 The district court responded as follows:

33 If the parties have agreed to a form, and one of them
34 asks to switch to a different form, there are three
35 possibilities. The first occurs if the other party

1 responds by saying it agrees. Obviously, in that
2 instance the parties have agreed to a new form and that
3 form governs, even if the party receiving the new form
4 did not bother to read it, so long as that party
5 received fair notice that it was getting a new form.
6 The second occurs if the other party disagrees. In
7 that instance, since there was an earlier agreement to
8 a form, that earlier agreement continues to govern
9 because it cannot be changed without the agreement of
10 both parties. However, if the other party expresses
11 neither agreement nor disagreement, but simply remains
12 silent, what happens? The answer is that the earlier
13 agreement continues to govern, unless silence would
14 mislead the party that asked to switch forms by making
15 that party believe that there had been an agreement.

16 On the seventh day of the deliberations, the jury indicated
17 that it had reached unanimous verdicts as to all the insurance
18 companies except for one: Swiss Re. The jury then stated, "We
19 have focused our efforts on this one insurer for the majority of
20 the last five days, with great diligence, and in spite of our
21 best efforts have not been able to reach a unanimous decision."
22 After taking the verdicts for all the insurance companies except
23 Swiss Re, the district court issued an Allen charge and dismissed
24 the jury for the weekend.

25 On the following Monday, the jury resumed its deliberations.
26 During the afternoon, the jury sought further clarification of
27 the district court's instructions regarding the ramifications of
28 Swiss Re's silence after receiving the Travelers form:

29 What if a party's silence to a proposed change in form
30 makes the other party believe that there was no
31 agreement to change the form at that time, but leaves
32 the decision as to a change in form open to be agreed
33 or disagreed up to the time of final policy being
34 issued? During the period between the binder being
35 signed and the loss, can the decision as to whether or

1 not to change form (effective during the binder period)
2 be left outstanding?

3 Counsel for Silverstein argued that the district court
4 should instruct the jury on the possibility that Swiss Re never
5 accepted the WilProp form. The district court refused: "Mr.
6 Wachtell, if they are on page 18, that is headed Change in Form,
7 and I am not about to tell them . . . they shouldn't be on page
8 18." Instead, the district court sent a follow-up question: "Are
9 you asking about what happens if one party proposes some change
10 in the status of a form previously agreed to but the parties do
11 not mutually agree that a change will take place?"

12 Shortly thereafter, the jury returned a final note in
13 response: "We are asking about what happens if one party
14 proposes a change to another policy form but the parties do not
15 mutually agree that a change will take place." The district
16 court responded to the note by stating, "Jurors, if there was an
17 initial agreement, that agreement continues to control unless and
18 until the parties agree that it does not control." Moments
19 later, the jury returned a verdict for Swiss Re.

20 As the preceding recitation makes plain, the district court
21 provided fair and balanced instructions that contemplated the
22 many possible outcomes, including the Silverstein Parties'
23 "withdrawal of form" theory. The charge also made plain that
24 before the jury could arrive at the "Changing from the Original
25 Form" section, it had to first find that the parties agreed to an

1 initial form. The Silverstein Parties' arguments to the contrary
2 are without merit.

3 **3. Claimed Charging Errors as to the Domestic**
4 **Insurers**

5 The Silverstein Parties also contend that instructional
6 error contributed to the verdicts in favor of all three of the
7 domestic insurers: Federal, Lexington, and Wausau. The record,
8 however, does not suggest error, let alone prejudicial error.

9 As an initial matter, the Silverstein Parties return to a
10 familiar refrain: They argue that the "Changing from the
11 Original Form" instruction was prejudicial because it prevented
12 the jury from finding that there was no agreement as to a
13 particular form, and from this the jury might have concluded that
14 the insurers' customary form governed. For the reasons stated
15 above, we reject this argument.

16 The Silverstein Parties also argue that the district court's
17 instructions were erroneous as to a particular provision in the
18 binder drafted by Willis, which provided "manuscript form . . .
19 as ultimately agreed." The Silverstein Parties argue that the
20 evolution of this provision supports a conclusion that the
21 domestic insurers did not intend to bind to the WilProp form.

22 When Willis initially sent a proposed binder to the domestic
23 insurers, it included a section entitled "Property and Time
24 Element Covered." That section provided the following statement:

1 And as incorporated into the manuscript form, in
2 conjunction with the contract between the Port
3 Authority of New York and New Jersey as attached.

4 When Willis sent out a new copy of the binder, however, it
5 changed this language slightly:

6 And as incorporated into the manuscript form, in
7 conjunction with the contract between the Port
8 Authority of New York and New Jersey as ultimately
9 agreed.

10 At trial and in their briefs before this court, the
11 Silverstein Parties argue that the language "as ultimately
12 agreed" referred to the "manuscript form." From this they argue
13 that the domestic insurers did not intend to bind to a form
14 during the binder period. Instead, they intended to use their
15 customary forms until the final policy form was in place.

16 The district court issued an instruction foreclosing this
17 argument as a matter of law:

18 Various witnesses have testified that the words "as
19 attached" and "as ultimately agreed" refer to a policy
20 form or forms. Regardless of what those witnesses may
21 believe or not, it has been determined that they do not
22 relate to a policy form or forms, they relate to the
23 lease agreement between the Port Authority and
24 Silverstein that was under negotiation; and that has
25 nothing to do with the issues before you. That has
26 been determined and you must accept that as true.

27 In giving this instruction, the district court relied upon a
28 portion of this court's prior decision, which the district court
29 interpreted to mean that no reasonable jury could find that the
30 words "as attached" and "as ultimately agreed" referred to
31 "manuscript form."

1 The district court's instruction and understanding were
2 consistent with our prior decision, in which we rejected as
3 unreasonable any claim that the language "as ultimately agreed"
4 could lend support to the proposition that the parties intended
5 to bind, sight-unseen, to the yet-to-be-issued Travelers form.
6 World Trade Ctr. Props., 345 F.3d at 173. We explained that the
7 language "as ultimately agreed," which was included in the
8 section labeled "Property and Time Element Covered," referred to
9 the Port Authority's contract with the Silverstein Parties
10 regarding the leased property, not the exchanged "manuscript
11 form." Id. ("From all these references to the ultimate agreement
12 between the Port Authority and Silverstein Properties, the most
13 that can be gleaned is that the precise parameters of the
14 property covered by the insurance would have to await the
15 finalization of that contract. No factfinder could reasonably
16 find that these references related to following the form of
17 Travelers as the lead insurer." (emphasis added)). Accordingly,
18 the district court's instruction was not erroneous.

19 **D. Remaining Arguments**

20 We have considered the Silverstein Parties' remaining
21 arguments relating to the Phase I appeals - including other
22 evidentiary arguments not addressed above - and find them all to
23 be without merit.

24 **II. Phase II Appeals**

1 The issue before the Phase II jury was whether each of the
2 remaining insurers issued binders or, in the case of Allianz, a
3 final policy that contemplated a one- or two-occurrence treatment
4 of the terrorist attacks of September 11. The Phase II insurers
5 are the three insurers who were found not to have bound to the
6 WilProp form (Zurich, Royal Specialty, and Twin City) and six
7 other insurers who conceded that they did not issue a binder or
8 final policy governed by the WilProp form (Allianz, Gulf
9 Insurance Co. ("Gulf"), Industry Risk Insurers ("IRI"), TIG
10 Insurance Co. ("TIG"), Travelers Indemnity Co. ("Travelers"), and
11 Tokio Marine and Fire Insurance Co. ("Tokio Marine")). The Phase
12 II jury found that all nine of these insurers issued binders or,
13 in the case of Allianz, a final policy form that contemplated a
14 two-occurrence treatment of the events of September 11. Eight of
15 these insurers appeal; Tokio Marine reached a settlement with the
16 Silverstein Parties after the jury rendered its verdicts.

17 The appellant-insurers assert four principal arguments on
18 appeal. They argue that they are entitled to (1) a new trial
19 based on the admission of expert testimony provided by a
20 Silverstein Parties' witness, (2) judgment as a matter of law
21 because the Silverstein Parties failed to provide sufficient
22 evidence of the parties' intent, (3) judgment as a matter of law
23 based on the language in each insurers' policy form, and (4) a
24 new trial based on the admission of purportedly irrelevant and
25 highly prejudicial evidence during the examination of a Travelers

1 claims executive. The Phase II insurers also assert various
2 subsidiary arguments, which do not warrant formal treatment in
3 this opinion. We address their principal arguments in turn.

4 **A. Expert Testimony**

5 **1. Admission of Expert Testimony**

6 As an initial matter, the insurers argue that the district
7 court should not have permitted a Silverstein Parties witness to
8 testify as to custom and usage in the insurance industry.
9 Specifically, they contend that Jeffrey McKinley was not
10 qualified to testify as an expert witness on customs and
11 practices regarding "per occurrence property insurance" coverage.
12 We disagree.

13 The Silverstein Parties proffered McKinley as an expert
14 witness on property insurance coverage and sought to qualify him
15 based on his experience in the industry. McKinley had 31 years
16 of experience in the insurance industry, including 23 years as a
17 broker specializing in property insurance and 4 years as an
18 underwriter for a property insurance company. McKinley also has
19 reviewed hundreds of per occurrence property insurance forms
20 during the course of his career.

21 The insurers offer three main criticisms: (1) McKinley
22 lacked practical experience on which to ground his opinion, (2)
23 McKinley employed no genuine methodology and drew upon no
24 external reference points in reaching his opinion, and (3)

1 McKinley could not offer a consistent, reliable methodology by
2 which he applied his opinions to the facts of this case. All of
3 these arguments fail.

4 The insurers recognize that an expert may be qualified based
5 on his experience. See Fed. R. Evid. 702 (stating that an expert
6 may be qualified based on "knowledge, skill, experience,
7 training, or education"). They contend, however, that such an
8 expert "must show how his or her experience (here, experience in
9 the property insurance industry) led to his conclusion or
10 provided a basis for his opinion." And we agree. McKinley,
11 however, was able to satisfy these criteria. He testified that
12 he had over 30 years of experience in the insurance industry (as
13 both an underwriter and a broker) and he was familiar with
14 practices in the industry, including the practices that related
15 to "per occurrence" property provisions. He explained that
16 through these experiences, he was able to identify a practice
17 whereby insurers tie the definition of occurrence to a physical
18 cause of loss in order to maximize the number of deductibles that
19 an insured would be required to pay. And he testified that
20 insurers used "hours" clauses when they wished to aggregate the
21 losses associated with specific perils - e.g., hurricanes and
22 earthquakes.⁷ The fact that McKinley was not aware of any

⁷ An hours clause treats all losses associated with a specific peril as one event or occurrence, provided that the losses took place within a specified time-period. Thus, an hours clause might read: "All losses arising from a hurricane, flood, or

1 instance where his understanding of custom and practice had been
2 applied to a terrorism case is hardly surprising given the
3 unprecedented nature of the September 11 attacks; fortunately,
4 insurers have not had to adjust many terrorism losses.

5 The insurers make much of the fact that McKinley's testimony
6 differed from that of Douglass, a Willis employee who testified
7 during a deposition that when Willis defined the term
8 "occurrence" in the 2000 WilProp, it did not intend to change the
9 meaning of that term as it existed in previous forms designed by
10 Willis. McKinley's testimony, however, was not inconsistent with
11 this testimony. On direct, McKinley testified that insurers used
12 a narrow definition of "occurrence" to maximize the number of
13 deductibles. The fact that insureds, through brokers like
14 Willis, understood their own forms to incorporate a broad
15 definition of "occurrence" in no way detracts from McKinley's
16 testimony that insurers used a narrow definition of "occurrence."
17 During the second phase of the trial, it was the insurers' forms
18 that governed. A reasonable factfinder could conclude that when
19 the Silverstein Parties acquiesced to an insurer's customary
20 form, they were accepting that insurer's narrow conception of
21 occurrence.

22 In arguing that McKinley's testimony was inadmissible, the
23 insurers also ignore the fact that his testimony did not depend

earthquake shall be considered one occurrence if they were
sustained within a seventy-two hour period."

1 on engineering or scientific expertise; it concerned the customs
2 and practices of the insurance industry. In Iacobelli
3 Construction, Inc. v. County of Monroe, involving a dispute over
4 the meaning of a public construction contract, this court
5 distinguished between expert testimony concerning "scientific
6 knowledge" and testimony regarding "trade usage." 32 F.3d 19, 25
7 (2d Cir. 1994). Iacobelli Construction sued the County of Monroe
8 after the county denied its request for additional compensation
9 under the contract's "differing site conditions" clause. Id. at
10 21. According to Iacobelli Construction, "it encountered more
11 subsurface water inflows during construction of [a] tunnel than
12 it had anticipated." Id.

13 The minutia of public construction contracts aside, the case
14 involved a battle of experts over the proper interpretation of
15 the construction contract and the pre-bid conditions at the
16 contracting site. See id. at 24-25. Both sides submitted expert
17 affidavits, which "purported to summarize and analyze the site
18 conditions, the contract documents, and the project's results."
19 Id. at 24. The district court, however, excluded Iacobelli
20 Construction's submissions under Daubert v. Merrell Dow
21 Pharmaceuticals, Inc., 509 U.S. 579 (1993), and granted summary
22 judgment in favor of the defendants. Iacobelli, 32 F.3d at 24-
23 25. The district court held that Iacobelli Construction's
24 "affidavits were conclusory and failed to articulate how they
25 arrived at their conclusions" and viewed them as "an attempt to

1 'supplant [the] court's interpretation of the documents with [the
2 expert's] own conclusions, based upon his interpretation of trade
3 usage.'" Id. at 24. This court reversed on appeal:

4 We believe the district court erred in its rejection of
5 the affidavits of [plaintiff's experts]. Its reliance
6 on Daubert was misplaced. Daubert sought to clarify
7 the standard for evaluating "scientific knowledge" for
8 purposes of admission under Federal Rule of Evidence
9 702. . . . The affidavits of [plaintiff's experts] do
10 not present the kind of "junk science" problem that
11 Daubert meant to address. Rather, they rely upon the
12 type of methodology and data typically used and
13 accepted in construction-litigation cases.

14 Id. at 25 (citations omitted).

15 We conclude that the district court acted within its
16 discretion when it permitted McKinley to testify as an expert on
17 custom and practice in the property insurance industry. See
18 Campbell v. Metro. Prop. & Cas. Ins. Co., 239 F.3d 179, 185 (2d
19 Cir. 2001) (reviewing the admission of expert testimony "under a
20 deferential abuse-of-discretion standard"); see also Gen. Elec.
21 Co. v. Joiner, 522 U.S. 136, 142-43 (1997). To the extent that
22 there are gaps or inconsistencies in McKinley's testimony, those
23 issues "go to the weight of the evidence, not to its
24 admissibility." Campbell, 239 F.3d at 186; cf. Daubert, 509 U.S.
25 at 595 ("The focus [of the admissibility inquiry], of course,
26 must be solely on principles and methodology, not on the
27 conclusions that they generate."). "[T]he weight of the evidence
28 is a matter to be argued to the trier of fact, not a basis for
29 reversal on appeal." Campbell, 239 F.3d at 186.

1 **2. Sufficiency of Custom and Usage Evidence**

2 Even if McKinley is qualified to testify as an expert, the
3 insurers argue that his testimony was legally insufficient to
4 establish that there was a "fixed and well-established" industry
5 custom that the undefined term "occurrence" referred to a
6 physical-cause-of-loss. They also argue that McKinley's
7 testimony was inadmissible because it failed to establish an
8 industry custom regarding the undefined term "event," as that
9 term was used by some of the insurers when they defined the term
10 "occurrence." We conclude that McKinley's testimony presented
11 evidence sufficient to raise an issue of fact as to whether the
12 terms "occurrence" and "event" held a uniform meaning among the
13 insurers.

14 Under New York law, evidence of custom and usage must
15 establish that (1) the term in question has a "'fixed and
16 invariable'" usage and (2) that the "party sought to be bound was
17 aware of the custom, or that the custom's existence was 'so
18 notorious' that it should have been aware of it." British Int'l
19 Insur. Co. v. Seguros La Republica, S.A., 342 F.3d 78, 84 (2d
20 Cir. 2003) (citations omitted). "The trade usage must be 'so
21 well settled, so uniformly acted upon, and so long continued as
22 to raise a fair presumption that it was known to both contracting
23 parties and that they contracted in reference thereto.'" Id. at
24 84 (citation omitted). "The burden of proving a trade usage has
25 generally been placed on the party benefitting from its

1 existence." Id. at 83 (citation, quotation marks, and alteration
2 omitted).

3 "Whether a usage exists is a question of fact, to be
4 determined by the trier of fact." 12 Richard A. Lord, Williston
5 on Contracts § 34:19 (4th ed. & Supp. 2005) (footnotes omitted);
6 accord Walls v. Bailey, 49 N.Y. 464, 476 (1872) ("Not only the
7 existence of such a usage, but whether knowledge of it exists in
8 any particular case, is a question of fact for the jury."). As
9 is the case with all factual questions, however, "the evidence of
10 the existence of a custom and usage can be insufficient to
11 warrant submission of the question to the jury." Lord, supra, §
12 34:19 (citing McClellan v. Pa. R.R. Co., 62 F.2d 61, 63 (2d Cir.
13 1932)).⁸

14 The precise standard for determining whether a party has met
15 its burden of production with respect to custom-and-usage
16 evidence has not been clearly articulated under New York law. We

⁸ Although Williston on Contracts relies on McClellan for the unexceptional proposition that "evidence of the existence and usage can be insufficient to warrant submission of the question to the jury," Lord, supra, § 34:19, McClellan involved the question whether there was evidence of a custom-to-warn-employees sufficient to establish liability in negligence under the Federal Employers' Liability Act, see McClellan, 62 F.2d at 62. McClellan did not involve contract interpretation. See id. In reciting the standard for custom and usage in the context of federal tort liability, the McClellan court stated: "Proof of a custom cannot be said to be enough to submit that issue to the jury unless there is substantial evidence to show that what is called custom amounts to a definite, uniform, and known practice under certain, definite, and uniform circumstances." Id. at 63. We intimate no view on whether this is the appropriate standard governing the meaning of a contract under New York law.

1 conclude that to raise a genuine issue of fact as to the
2 existence of a particular custom and usage, the party seeking to
3 establish that custom and usage must establish, by competent
4 evidence, that the practice is fixed and invariable. See
5 Lawrence v. Cohn, 325 F.3d 141, 150-51 (2d Cir. 2003) (holding
6 that an "affidavit constituted credible evidence of the
7 invariable meaning of the terms" in a partnership agreement, but
8 also noting that the affidavit "was not contradicted by any
9 evidence proffered by the plaintiffs"). Where one party submits
10 evidence that a particular custom or usage exists, and where the
11 other party - the party to be charged with actual or constructive
12 knowledge of that custom - puts forth evidence to the contrary,
13 the question should be submitted to a jury unless no reasonable
14 factfinder could find that such a custom existed. See Dickinson
15 v. City of Poughkeepsie, 75 N.Y. 65, 77 (1878) (stating that if
16 witnesses from both parties "differ as to [the] existence [of a
17 particular custom] in the same place or in all places, . . . this
18 would raise a question for the jury"); accord Scott v. Brown, 60
19 N.Y.S. 511, 512 (App. Term. 1899); see also Walls, 49 N.Y. at
20 476-77.

21 Informed by these standards, we conclude that the
22 Silverstein Parties brought forth evidence sufficient to
23 establish an industry custom that insurers utilize a narrow
24 definition of "occurrence" in their industry forms. McKinley
25 testified that, absent a total loss, it is in an insurer's best

1 interest to define "occurrence" in terms of a physical-cause-of-
2 loss in order to maximize the number of deductibles that an
3 insured is required to pay. McKinley also testified that, in his
4 experience, this definition "does not vary" and is "well known
5 within the industry."

6 It is for the jury . . . , under proper instructions
7 from the court, to take all the evidence in the case;
8 that as to the existence, duration and other
9 characteristics of the custom or usage, and that as to
10 the knowledge thereof of the parties; and therefrom to
11 determine whether there is shown a custom of such age
12 and character, as that the presumption of law will
13 arise, that the parties knew of, and contracted in
14 reference to it

15 Walls, 49 N.Y. at 477. Not one of the insurers has raised a
16 serious challenge to the district court's instructions on the
17 standard that the jury should apply or the weight that should be
18 given to custom and usage evidence.⁹ We hold that the district

⁹ The district court's jury instruction with respect to custom and usage evidence provided:

To help you decide what the parties intended by the term occurrence, you may also consider evidence of the custom and usage in the insurance industry as to the accepted meaning of that term. However, I want to caution you that the issue you must resolve is what the parties intended, not simply what was customary or common usage in the insurance industry.

The Silverstein parties have presented evidence as to the custom and usage in the insurance industry with respect to the meaning of the term occurrence when that term is either not defined, or is defined as it is in the forms that govern here. The insurance companies have presented contrary evidence on that subject.

In order for any party to prevail on its view of custom and usage, that party must prove two things by a

1 court did not err in permitting the jury to consider evidence of
2 an industry custom regarding the undefined term "occurrence" in
3 the insurers' customary forms.

4 In order to establish a custom adverse to all of the Phase
5 II insurers, however, the Silverstein Parties were required to
6 elicit testimony regarding the meaning of "occurrence" as that
7 term was defined by at least five of the eight Phase II appellee-
8 insurers (Allianz, IRI, TIG, Zurich, and Twin City).¹⁰ These
9 insurers' forms defined the term "occurrence" to mean a loss,
10 disaster or casualty, or a series of losses, disasters or

preponderance of the evidence: (i) that the meaning of the term occurrence was fixed and well-established in the insurance industry, and (ii) either that the parties you are considering knew of that fixed and well-established meaning, or that the meaning was so universally accepted that the parties should have been aware of it. If you find that the evidence of custom and usage does meet this test, you should apply it where you find it relevant, unless you find that there is more convincing evidence showing a different intent by the parties. If you do find that there is evidence of the parties' actual intent that is more convincing than the evidence of insurance industry custom and usage, even after you weigh the effect of custom and usage on the parties' intent, then that more convincing evidence should prevail.

¹⁰ Royal Specialty issued separate binders for each of the three layers of coverage that it provided for the WTC placement. Royal Specialty acknowledges that a standard industry form (ISO form) governed all layers of its coverage and did not include a definition of "occurrence." Royal Specialty, however, issued a separate form governing its participation in the excess layers. The excess-layer form defined "occurrence" based on the one-event formulation utilized by many of the other phase II insurers. Thus, to the extent that the excess-layer form governed Royal Specialty's participation, its obligations are determined based on the one-event formulation of "occurrence."

1 casualties arising out of one "event" (or a single event). Their
2 forms, however, did not define the term "event."

3 As the insurers point out, McKinley testified neither that
4 the term "event" is invariable nor that it has a well-known
5 meaning within the industry. Instead, he stated his agreement to
6 the posed question: "Is there a general understanding in the
7 insurance industry as to the meaning of the term event in a
8 property insurance policy that leaves that term undefined?" His
9 agreement - that there is a "general understanding" in the
10 insurance industry - would appear insufficient, on its own, to
11 establish a fixed and invariable custom regarding the term
12 "event." See Hutner v. Greene, 734 F.2d 896, 900 (2d Cir. 1984)
13 (holding that, under New York law, an affidavit stating that a
14 practice is "often used" is insufficient to establish a triable
15 issue that a "fixed and invariable" custom exists).

16 The Silverstein Parties argue that even though McKinley did
17 not use the words "well known" or "does not vary" to describe the
18 meaning of the phrase "one event," he "unequivocally testified
19 that the undefined term occurrence has the same meaning in the
20 industry as the 'arising out of one event' formulation, including
21 the 'arising out of one event' formulation used in IRI's form and
22 the Allianz policies.'" Stated differently, the one-event
23 formulation and the undefined term "occurrence" are each tied to
24 a physical cause of loss. Although we regard this as a close

1 question, we conclude that the Silverstein Parties have met their
2 burden of production with regard to establishing the existence of
3 a custom associated with the one-event formulation of the term
4 "occurrence," as that term is defined in the insurers' customary
5 policy forms. Our conclusion is supported by the fact that the
6 insurers likewise stated and argued to the jury, during both
7 their opening and closing statements, that their policy forms,
8 despite any differences, each treated the number of occurrences
9 the same way - albeit as a single occurrence. Cf. Dickinson, 75
10 N.Y. at 77 (stating that if witnesses from both parties "differ
11 as to [the] existence [of a particular custom] in the same place
12 or in all places, this would raise a question for the jury"). A
13 reasonable jury could conclude that where the term "occurrence"
14 appears in an insurer's customary form, it is intended to mean
15 the same thing regardless of whether that term is defined based
16 on a one-event formulation.

17 **B. Sufficient Evidence of Intent**

18 Various insurers also contend that the Silverstein Parties
19 failed to produce evidence of intent sufficient to permit a jury
20 to find that the terrorist attacks of September 11 constituted
21 two occurrences under the insurers' policy forms. Their
22 arguments pursue a common theme: At trial, the Silverstein
23 Parties failed to adduce any evidence of the parties' intent to
24 accept a definition of occurrence that contemplated a two-
25 occurrence treatment of the events of September 11. We disagree.

1 In addition to McKinley's custom and usage testimony, the
2 jury had before it evidence that (1) none of the Phase II
3 insurers bound to the WilProp form; (2) the WilProp form treated
4 the term "occurrence" differently than the insurers' forms
5 treated that term; (3) the Silverstein Parties did not obtain
6 congruent coverage during the binder period but instead bound to
7 the Phase II insurers' company forms and, on other instances,
8 bound to the WilProp form; (4) there is language contained in
9 each of the Phase II insurers' forms that provides that coverage
10 is triggered by a direct physical loss or damage to the insured
11 property; (5) most of the Phase II insurers' forms included
12 "hours" clauses, which aggregated the losses associated with
13 certain causes of loss but did not specifically refer to losses
14 caused by fire, aircraft, or acts of terrorism; and (6) the
15 destruction of the WTC was caused by separate fires, resulting
16 from separate collisions by separate aircraft into separate
17 buildings. We conclude that this evidence was sufficient to
18 support the jury verdicts. See World Trade Ctr. Props., 345 F.3d
19 at 190 ("To be sure, a jury could find two occurrences in this
20 case . . . or it could find that the terrorist attack, although
21 manifested in two separate airplane crashes, was a single,
22 continuous, planned event causing a continuum of damage that
23 resulted in the total destruction of the WTC, and, thus, was a
24 single occurrence."); cf. Newmont Mines Ltd. v. Hanover Ins. Co.,
25 784 F.2d 127, 135, 137 (2d Cir. 1986) (holding that "the evidence

1 developed at trial[, which consisted mostly of evidence that
2 excess snow accumulated on two separate sections of a roof, each
3 capable of supporting a weight of ice and snow independent of the
4 other,] fully supported a finding that the collapse on two
5 different days of two separate sections of the . . . roof
6 constituted two occurrences").

7 **C. Judgment as a Matter of Law**

8 Those insurers whose forms defined the term "occurrence"
9 argue that they are entitled to judgment as a matter of law,
10 because the defined term "occurrence" unambiguously contemplated
11 a one-occurrence treatment of the attacks of September 11. In
12 addition, Allianz argues that it is entitled to judgment as a
13 matter of law because its "hours" clause - a clause designed to
14 aggregate specific perils and treat them as a single occurrence
15 if any one of those perils occurs within a specified time period
16 - applies to "vandalism and malicious mischief"; it argues that
17 terrorist acts come within the ambit of "vandalism and malicious
18 mischief" and, as a result, the attacks of September 11 should be
19 treated as a single occurrence as a matter of law. We address
20 these arguments seriatim.

21 **1. The Defined Term "Occurrence"**

22 Those insurers whose forms defined the term "occurrence" to
23 mean any loss or a series of losses arising out of one event (or
24 a single event) argue that this definition is sufficiently
25 unambiguous to justify judgment in their favor as a matter of

1 law. They argue that the district court construed the term
2 "event" to mean "occurrence," and that this reading robbed the
3 definition of "occurrence" of any meaning because it was designed
4 to aggregate a "series of losses" arising out of any "event" and
5 treat those losses as a single occurrence. In the words of one
6 of these insurers, "[T]he fact that the attack was an 'event' and
7 the fact that the destruction of the World Trade Center arose out
8 of it are dispositive."

9 Obviously, the meaning of the term "event" is of critical
10 importance. If "event" is interpreted to mean "all related
11 phenomena," then the insurers' definition of "occurrence" would
12 aggregate all losses associated with all related phenomena, such
13 as the coordinated terrorist attacks of September 11, and treat
14 them as one "occurrence." If, on the other hand, "event" is
15 defined to mean "a physical phenomenon," then the insurers'
16 definition of "occurrence" would treat all losses associated with
17 a single physical phenomenon, such as a single aircraft
18 collision, as one "occurrence." In either case - whether "event"
19 is defined broadly (all related phenomena) or narrowly (a
20 physical phenomenon) - the provision would continue to perform
21 its aggregating function; it would continue to treat all losses
22 associated with a given "event" as a single "occurrence." Thus,
23 if "event" is defined to mean "a physical phenomenon," and if a
24 single airplane crash caused damage to both towers of the WTC,
25 then the Silverstein Parties would be entitled to recover for

1 only one "occurrence," even though the plane caused losses to
2 both buildings. Unfortunately for the insurers, on the facts of
3 this case, a narrow reading of "event" - defined as "a physical
4 phenomenon" - would entitle the Silverstein Parties to two
5 separate recoveries: One recovery for each airplane crash,
6 limited to all losses associated with each crash.

7 We conclude that the defined term "occurrence" is not
8 sufficiently unambiguous, because the word "event" is susceptible
9 to more than one reasonable interpretation. As a result, the
10 insurers are not entitled to judgment as a matter of law.

11 **2. "Vandalism and Malicious Mischief"**

12 Allianz argues that it is entitled to judgment as a matter
13 of law based on its "hours" clause, which aggregates all losses
14 associated with certain specified perils. Its hours clause
15 provides:

16 When the word ["occurrence"] applies to loss or losses
17 from the perils of tornado, cyclone, hurricane,
18 windstorm, hail, flood, earthquake, volcanic eruption,
19 riot, riot attending a strike, civil commotion and
20 vandalism and malicious mischief one event shall be
21 construed to be all losses arising during a continuous
22 period of seventy-two (72) hours.

23 Allianz contends that the terrorist attacks of September 11 are a
24 form of "vandalism and malicious mischief" and, as a result,
25 these attacks should be treated as a single occurrence as a
26 matter of law.

27 In our prior opinion in this matter, we explained that
28 "[w]hether a contract is ambiguous is a question of law for a

1 court to determine as a threshold matter." World Trade Ctr.
2 Props., 345 F.3d at 184. We also explained that "an ambiguity
3 exists where a contract term could suggest more than one meaning
4 when viewed objectively by a reasonably intelligent person who
5 has examined the context of the entire integrated agreement and
6 who is cognizant of the customs, practices, usages and
7 terminology as generally understood in the particular trade or
8 business." Id. (quotation marks and citation omitted).

9 Following a standard similar to that employed by this court,
10 Judge Martin found that the phrase "vandalism and malicious
11 mischief" is sufficiently ambiguous to preclude summary judgment.
12 SR Int'l Bus. Insur. Co. v. World Trade Ctr. Props. LLC, No. 01
13 Civ. 9291, 2003 WL 554768, at *6 (S.D.N.Y. Feb. 26, 2003). Judge
14 Martin explained:

15 Applying the test of "common speech," it cannot be said
16 that the ordinary businessman would consider an act of
17 wanton terrorism such as the attack on the World Trade
18 Center to be an act of malicious mischief or vandalism.
19 One could argue that the Japanese attack on Pearl
20 Harbor fits within the dictionary definition of
21 "malicious mischief" or "vandalism." But, if one
22 searched all of the contemporaneous or historical
23 accounts of that attack, it is doubtful that even one
24 account would be found which described it as an act of
25 malicious mischief or vandalism. Since the attack on
26 the World Trade Center resulted in an even greater loss
27 of life and property damage than the raid on Pearl
28 Harbor, it is equally inappropriate to describe that
29 attack as an act of malicious mischief or vandalism.
30 Although the full text of the "occurrence" definition
31 in the Allianz policies supports the argument that the
32 attack on the World Trade Center should be considered
33 one occurrence, that is not the only reasonable
34 construction of the definition. Therefore, the issue

1 must be decided by a jury and the motion for summary
2 judgment is denied.

3
4 Id. We agree with Judge Martin's conclusion. Allianz has not
5 pointed to a general practice within the insurance industry of
6 treating terrorism as a form of vandalism, and if it wished to
7 specifically incorporate acts of terrorism within its hours
8 clause, it certainly could have done so. The phrase "vandalism
9 and malicious mischief" is sufficiently ambiguous to preclude
10 judgment as a matter of law in Allianz's favor.

11 **D. Admission of Purportedly Irrelevant and Prejudicial**
12 **Evidence During the Examination of a Travelers Claims**
13 **Executive**

14 Travelers makes an argument (adopted by several of the other
15 insurers) that the district court abused its discretion by
16 permitting the Silverstein Parties to cross-examine William
17 Guernsey, a Travelers claims executive, about a comparison he and
18 other Travelers executives drew between the events of September
19 11 and Travelers' treatment of claims associated with four fires
20 that were set to four separate courthouses in California by a
21 single arsonist (the "Contra-Costa claims"); Travelers treated
22 these claims as four separate occurrences, which required four
23 separate deductibles. Travelers argues that this evidence was
24 irrelevant, and even if it was relevant, it was highly
25 prejudicial and should have been excluded by the district court.

26 Guernsey was responsible for adjusting both the WTC and the
27 Contra-Costa claims. On September 11, 2001, he learned that

1 Travelers had provided coverage to the WTC, that the Travelers
2 form governed its coverage, and that the Travelers form did not
3 define the term "occurrence." Guernsey was already well-aware
4 that Travelers had decided to treat the Contra-Costa claims as
5 separate occurrences under a similar policy form, even though two
6 of the four fires that were set to the courthouses occurred at
7 closely situated buildings only minutes apart. On the very same
8 day, September 11, the Ninth Circuit issued an opinion adopting
9 the position that Travelers had pressed in litigation associated
10 with the Contra-Costa claims. Lexington Ins. Co. v. Travelers
11 Indem. Co. of Ill., No. 00-15407, 2001 WL 1132677, at *4 (9th
12 Cir. Sept. 11, 2001) ("We agree with the district court that four
13 separate fires in four separate buildings at four separate
14 locations constitute four separate occurrences for purposes of
15 the [the primary insurers'] liability and the policy deductible."
16 (citation omitted)). Shortly thereafter, Guernsey and other
17 Travelers executives recognized the relevance of that litigation,
18 as it related to their World Trade Center placement; they also
19 recognized the irony that Travelers had pressed its position for
20 a narrow definition of "occurrence" in the Contra-Costa case.

21 Although the district court prevented the Silverstein
22 Parties from providing to the jury statements that Travelers had
23 made in its briefs in the Contra-Costa litigation, it permitted
24 the Silverstein parties to cross-examine Guernsey on the
25 comparison he drew between the two claims. Apparently, the

1 district court found this information relevant to the Travelers
2 executives' pre-9/11 intent. The insurers never moved for a
3 limiting instruction, and both sides were permitted to make
4 arguments on the significance of this evidence. We find no abuse
5 of discretion in allowing this cross-examination of Guernsey.

6 **E. Remaining Arguments**

7 The Phase II appellant-insurers press several other
8 arguments - among them, additional claims of error in the
9 admission and exclusion of evidence, a purported jury-charge
10 error, even a claim that Silverstein Parties were not entitled to
11 factfinding by a jury. We have considered all of these arguments
12 and find them to be without merit.

13 * * * * *

14 Both the Silverstein Parties and the Phase II appellant-
15 insurers suggest that the divergent judgments entered in these
16 cases must be the product of manifest error. Implicit in their
17 arguments is an all-or-nothing supposition: Because it was in
18 both sides' interest to develop congruent coverage that would
19 govern during the final policy period, and given that half the
20 insurers bound to forms that contemplated one type of coverage,
21 all the insurers must have bound to forms that contemplated the
22 same coverage during the binder period. We disagree. This all-
23 or-nothing supposition is mistaken because it assumes that
24 congruent coverage was achieved during the binder period and
25 ignores overwhelming evidence that different insurers issued

1 interim binders governed by different forms. These forms were
2 designed with different interests in mind and, not surprisingly,
3 yielded different results. In our opinion, the jury's
4 determination that the insurers provided different coverage is
5 not a manifestation of judicial error - indeed, Chief Judge
6 Mukasey did a masterful job shepherding this complex, hotly
7 contested case through both phases of a lengthy jury trial - but
8 rather, a reflection of the fact that the parties were at various
9 stages of negotiating coverage when the two hijacked airplanes
10 destroyed the WTC.

11 **CONCLUSION**

12 The judgments of the district court are AFFIRMED. The
13 appellants from the Phase I and II appeals shall bear a
14 proportional share of the appellees' costs associated with
15 defending each appeal.