Double Indemnity

Was the WTC disaster one incident or two? That's the $3.55B question, and two elite firms are taking it very personally

Alison Frankel
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Herbert Wachtell (l) and Barry Ostrager (r)
images: Catrina Genovese

Barry Ostrager, the Simpson Thacher & Bartlett litigation chief, is a big admirer of Herbert Wachtell. Really, he is. Big, big fan.

Never mind the adjectives he uses to describe the co-founder of Wachtell, Lipton, Rosen & Katz -- "obstreperous, obstructive and unreasonable." Forget the nasty accusations of witness manipulation that Ostrager has tossed at Wachtell Lipton partners in the World Trade Center insurance coverage litigation. Disregard Ostrager's amusement at what he calls the "feigned indignation" with which Wachtell has greeted the Simpson Thacher lawyer's tactics.

Put all that aside, Ostrager says. Focus instead on his great compliment to Herb Wachtell and his partners: But for Wachtell's ingenuity and persuasiveness, Ostrager says, there would be no World Trade Center insurance litigation. There would be no $3.55 billion dispute over the money owed to Wachtell's client, New York real estate developer Larry Silverstein, who signed a 99-year lease on the World Trade Center just two months before the attack on the towers. As Ostrager tells it, only a mind as brilliant as Wachtell's could have crafted a plausible argument that Silverstein is owed $7.1 billion, twice his ostensible policy limit, because the World Trade Center catastrophe constituted two discrete, insurable events, not one.

Of course, Ostrager's salute to Wachtell is just a tiny bit mitigated by his own role in the litigation. He is counsel to the Swiss Reinsurance Co., the carrier that underwrote about 22 percent -- $780 million -- of the Trade Center's insurance coverage. Swiss Re, like the rest of the 21 insurance companies battling Silverstein, is determined to prove that the Trade Center collapse constituted one occurrence under Silverstein's insurance coverage, not the two Silverstein claims.

The story of the Silverstein insurance program, assembled in the summer of 2001, is so far-fetched that any law professor who dreamed it up as a hypothetical would be laughed out of the classroom. Silverstein hired a well-known broker, Willis Group Holdings Ltd., to find enough coverage to satisfy his lenders. Willis scrambled mightily to place $3.55 billion in insurance, ultimately dealing pieces to 25 carriers. Negotiations were frenetic -- so frenetic that when Silverstein took over the lease of the Trade Center on July 24, 2001, he had in hand only temporary contracts from his insurers. Most of those had been executed on the basis of a sample form that Willis had circulated, a form that included a broad definition of what constituted an occurrence for insurance purposes. (The encompassing definition was designed by Willis to favor policyholders; the more damage that could be lumped into one occurrence, the fewer deductibles policyholders would have to pay.)

One key carrier, however, had refused to base negotiations on the Willis form. Travelers Indemnity Co. insisted on using its own form,

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which did not specifically define "occurrence," as the foundation of discussions about a final policy. Willis needed Travelers to stay in the deal, so Willis brokers spent August 2001 deep in negotiations with Travelers underwriters about changes proposed to the Travelers form. (These negotiations, interestingly, did not include discussion of the definition of "occurrence.") As of Sept. 11, Willis had not circulated final policies to any of the 25 carriers. Silverstein and Willis now say that all of the insurance companies should be held to the terms of the Travelers policy, which, in their lawyers' interpretation of New York state insurance law, leads to the conclusion that the Trade Center collapse constituted two occurrences. The insurers -- no surprise here -- say that the Willis form prevails.

What's more, asserts Ostrager, the Willis brokers who now support the Travelers scenario didn't always. Only after Wachtell Lipton lawyers got involved, Ostrager has said repeatedly in this litigation, did Willis witnesses convert to the story that favors Silverstein. Silverstein himself said as much, Ostrager argues, in a speech he delivered in December 2001 to the "CEO Summit" on Rebuilding Confidence in the U.S. Economy. "I had to find myself the best minds that I could find," Silverstein said, "to get me two events, to provide $7 billion." Those minds, in Ostrager's telling, belong to the Wachtell Lipton lawyers.

Ostrager is a slight 55-year-old with wavy, reddish hair and an insatiable appetite for competition; in his scant spare time he breeds racehorses. He graduated from New York University Law School 18 years after Herb Wachtell, and seems to be fairly frothing for confrontation with him. Ostrager has gone so far as to fling such phrases as "corruption of the discovery process" and "unconscionable interference by Wachtell" into a brief that accuses Wachtell Lipton lawyers of "exerting fantastic pressure" on Willis witnesses and "manipulating" their testimony.

Wachtell, who says that the evidence disproves the very thesis of Ostrager's accusations, responds to the Simpson Thacher lawyer with characteristic irascibility. When his partner Meyer Koplow calls Ostrager's attack "laughable," Wachtell cuts in. "It's not laughable," he says.

Wachtell, 70, is not a physically intimidating man. He has long, slicked-back gray hair, a thin, red face and piercing eyes. He wears half-frame glasses low on his nose. Yet somehow he is fearsome. "I don't like to see my partners accused of suborning perjury," he fumes. Ostrager, he says, is litigating this case with reckless aggressiveness. "He likes to distort facts," says Wachtell. "I am mightily pissed."

So far Ostrager is winning. The insurers have beaten Silverstein on almost every significant pretrial motion in the case, including a summary judgment motion by Wachtell that was denied. That's all just prelude, however. The judge in the case, John Martin Jr. of Manhattan federal district court, has appointed another federal judge, Lewis Kaplan, to oversee settlement talks this fall. If they fail, Ostrager and Wachtell will meet in court in November to try this case. Barry Ostrager will be looking to topple Wachtell. Herb Wachtell will be trying to put the Simpson Thacher lawyer in his place. And one of their clients will walk away hundreds of millions of dollars richer.

Larry Silverstein is Herb Wachtell's oldest friend. They met as teen-agers, at New York City's High School of Music & Art, where they both played piano. At New York University, both played in the band, Silverstein on drums and Wachtell on clarinet. They stayed close enough over the years that Silverstein had dinner at Wachtell's house the Friday before Sept. 11. Silverstein didn't use Wachtell Lipton as his regular lawyers -- Skadden, Arps, Slate, Meagher & Flom and Stroock & Stroock & Lavan routinely represented him -- but when he split from his business partner (and brother-in-law), Wachtell and his partners negotiated the breakup.

On Sept. 13, two days after the towers fell, Silverstein called Martin Lipton, also a close friend and a fellow NYU trustee, to ask if Lipton thought he'd need legal advice. "Marty said, 'And how,'" says Wachtell. "[Silverstein] hadn't thought through the scope of all the legal problems he could be facing. They'd lost four people from a small office. They were all traumatized." Silverstein arranged to come to Wachtell Lipton's offices later that afternoon.

Before he arrived, though, Wachtell had to figure out whether the firm could represent Silverstein beyond this emergency counseling session. "This would be a mammoth drain on firm resources," says Wachtell, who heads a litigation department of 53 lawyers, almost half of whom have become involved in the World Trade Center litigation. "It was a firm issue -- could we afford to take this on?" Wachtell Lipton's midtown Manhattan offices were in turmoil on Sept. 13. Some investment bankers from Keefe, Bruyette & Woods Inc., which had its offices in the World Trade Center, had been at a meeting at Wachtell Lipton when the planes hit the towers; the law firm volunteered to provide the Keefe Bruyette survivors (as well as some other lower Manhattan refugees) with a temporary headquarters. People were walking around carrying computers and phones for the guests. Wachtell Lipton lawyers were still in shock; collectively, they knew dozens of Trade Center victims. Many lawyers weren't even in the office. Herb Wachtell rounded up all of the partners who were around for an impromptu firm meeting. "We decided to do it for two reasons," he says. "Larry is my closest and oldest friend. And this was a civic thing -- we felt an obligation to be involved in the rebuilding of the city."

Silverstein, according to Wachtell Lipton partner Eric Roth, didn't stay long at Wachtell Lipton's offices on Sept. 13. Wachtell recalls talking briefly with Silverstein about several potential issues, including insurance. As it happened, Wachtell Lipton had argued an insurance coverage case in the New York Court of Appeals a week earlier (Simpson Thacher partner Mary Kay Vyskocil argued against him; Wachtell Lipton eventually won). He told Silverstein that, in his opinion, unless the insurance policy clearly stated otherwise, New York's laws would define the terrorist attacks as two occurrences, two insurable events.

But at that point, Silverstein's lawyers didn't know what the insurance policy said. Silverstein had already been in touch with John Gross, a partner at Proskauer Rose who specializes in insurance coverage. On Saturday the 15th, Gross and the Wachtell Lipton lawyers talked for the first time. "We had no idea what had happened," says Gross. "We were new counsel, we had not participated in

the placement. I suggested we go meet with the Willis people [who had brokered Silverstein's insurance] and find out what was going on." Roth agreed: "We had to go meet with Willis."

Willis Group Holdings Limited is a giant insurance broker, specializing in coverage for big commercial properties. Even by Willis standards, though, the World Trade Center insurance program was huge. The Port Authority of New York and New Jersey, which finished building the complex in 1972, carried only $1.5 billion (per occurrence) in coverage on all of its buildings, which, in addition to the Trade Center, included the three New York City area airports. Silverstein's lenders insisted on more coverage, first demanding $2.3 billion, then $3.2 billion, and then, right before the lease deal closed, $3.55 billion. The lead Willis broker on the insurance placement, Timothy Boyd, and his team hustled in June and July to satisfy the lenders, contacting carriers in the United States, Europe and Bermuda to place coverage. Willis distributed to many, but not all, of the carriers underwriting packets that featured not only the risk analysis documentation on the World Trade Center, but also a 37-page sample property insurance policy that Willis had developed, a form called the WilProp 2000. The WilProp form included a specific definition of occurrence, one designed to minimize deductibles for policyholders: "all losses or damage that are attributable directly or indirectly to one cause or to one series of similar causes."

The goal in multicarrier property insurance deals is to get all of the insurers to agree to issue the same final policy, so that there are no gaps in coverage. Carriers with smaller shares of the coverage frequently defer to the policy demands of bigger insurers, however, so brokers don't expect to negotiate final policy language with all (or even most) carriers. In the World Trade Center program, for instance, no negotiations took place with the London insurance syndicates, which actually, at the time they agreed to provide coverage, waived the right to sign off on final policy wording. Moreover, insurers typically issue temporary contracts binding them to provide coverage before they finish negotiating final policy language. Usually there's plenty of time to reconcile policies after the binders come in.

Distilling facts from the frenzied discussions that took place between Willis brokers and insurance company underwriters in July 2001 is no easy task, especially now. Willis broker Boyd testified that he didn't expect carriers simply to accept the WilProp sample form, but considered it a starting point for negotiations. Swiss Re seems to have regarded it the same way. Underwriter Daniel Bollier agreed on July 9 to carry about 22 percent of all layers of coverage beyond the first $10 million, but he told Willis broker Paul Blackmore that he wanted changes in the sublimit language in the WilProp form. (Bollier was satisfied with the WilProp occurrence definition and did not attempt to negotiate changes to it.) Other carriers also seemed to expect negotiations of final policy language; only two Bermudan insurers, ACE Ltd. and XL Capital Ltd., specifically referred to the WilProp form in their binders.

Before the lease deal closing, Willis issued certificates of insurance to Silverstein, confirming to his lenders and to The Port Authority that he had sufficient coverage. His 99-year lease, for which Silverstein put up only $14 million of his own money, closed on July 24. Willis broker Boyd, however, still had work to do. One carrier, Travelers, had informed Boyd that if Travelers was to participate in the primary layer of coverage, it would have to be on the basis of its form, not the WilProp form. Boyd had tried to find a substitute carrier with as high a rating as Travelers, but the market for World Trade Center insurance was saturated.

So in late July, Boyd began serious discussions with Travelers underwriter James Coyle III about what the final Travelers policy would say.

There is no dispute that Coyle first sent Boyd the Travelers sample policy on July 11. But what did Boyd and the rest of the Willis brokers tell the other carriers about the Travelers form? On this critical question, the accounts of the Willis brokers and insurance company underwriters diverge drastically.

If the case ever goes to trial, one of the key issues will be the exchanges between London broker Blackmore and Swiss Re underwriter Daniel Bollier. Blackmore testified that sometime between July 17 and 23, he told Swiss Re underwriter Bollier that WilProp had been replaced by Travelers; on July 23 his assistant e-mailed the Travelers form to Swiss Re. But Bollier swore he remembered no conversation with Blackmore about the Travelers form. He said he paid little attention to the e-mail attachment, which arrived without a note advising that Travelers was replacing WilProp. Timothy Boyd of Willis testified that he specifically informed underwriters at eight other insurance companies that Travelers would be the primary form; notes in the files of at least three carriers indicate that their underwriters had been told. But most of the carriers deny that anyone from Willis ever told them Travelers was replacing WilProp.

At the end of August, Coyle of Travelers sent Willis' Boyd a draft policy that included the changes they'd discussed. The Travelers policy did not define occurrence, leaving the interpretation to state law. Boyd, who did negotiate the wording of Travelers' deductibles clause, never attempted to add Willis' occurrence definition to the Travelers form. On that point, he deferred to Travelers. Boyd looked over what Coyle had sent him at the end of August, but didn't respond. Labor Day weekend arrived, and there didn't seem to be any rush.

Sept. 11 found most of the brokers on the Willis World Trade Center team in Nashville, at a previously scheduled meeting of Willis' property insurance group. Like the rest of the country, they watched the television in horror. With planes grounded, the brokers were marooned in Nashville, without their paperwork. Inevitably, they began the debate: Was the attack one occurrence or two?

Willis' counsel, Stuart Gerson of New York's Epstein Becker & Green, insists that these conversations were informal and purely hypothetical. Nevertheless, when Timothy Boyd, the lead broker on the World Trade Center program, called Willis' London office as he tried to reassemble the Silverstein documents, he told London staffers, according to the notes of one, "In their opinion this is one occurrence." (Both Boyd and the London staffer testified that they did not recall the conversation.) Another broker said something similar to Swiss Re's Daniel Bollier, according to Bollier's testimony. Silverstein's own risk manager hurriedly faxed a copy of portions of the WilProp form to a lawyer for The Port Authority with a cover note: "FYI the 'occurrence' definition and the insuring agreement and the exclusions in the Willis policy that we are working with." Several hours later he sent the same materials to one of Silverstein's lenders.

At the same time, however, Boyd was working with Jim Coyle of Travelers to get a final policy issued. Coyle agreed to send Boyd a policy that reflected the state of their negotiations as of Sept. 10. On Friday, Sept. 14, Travelers faxed a final policy -- which included no definition of "occurrence" -- to Willis' temporary headquarters in New Jersey. From there, Willis faxed it to Wachtell's offices.

"We were told two things," says Wachtell, "that the Travelers form was the governing form; and that they wanted to disseminate the policy to the marketplace. We said, 'No! You may not send it out until we can confirm the facts.'" Silverstein's lawyers pressed the Willis team for interviews with the brokers. Willis senior executives agreed that John Gross of Proskauer and Eric Roth and Marc Wolinsky of Wachtell Lipton could come to New Jersey on Monday, Sept. 17, to talk to the brokers.

Over the weekend, Gross and the Wachtell Lipton lawyers studied the documents Willis had sent them. Gross is as emphatic as Wachtell about the implications of the Travelers policy. Since it didn't specifically define "occurrence," the definition was left to state law. And under New York state law, Gross asserts, the attack on the twin towers constituted two occurrences. "I knew it without even going to the books," he says. But did the Travelers policy govern the World Trade Center insurance coverage? Gross and the Wachtell Lipton lawyers say that they got their answer in their interview with the Willis broker Timothy Boyd on Monday, Sept. 17.

If Barry Ostrager's theory -- that Wachtell concocted the Travelers policy scenario -- was correct, the "fantastic pressure" that Wachtell supposedly exerted on the Willis witnesses would have had to have begun during those Sept. 17 meetings, as the lawyers and brokers figured out what to tell the insurance market about the governing policy. Willis is a sophisticated company, so, naturally, its brokers were represented by their own lawyer at these initial interviews with Silverstein's counsel. Sitting at the head of the table as Roth, Gross and Wolinsky questioned Willis witnesses was a lawyer named Andrew Amer, from the firm that is Willis' longtime outside counsel: Simpson Thacher. Amer is a partner in the department headed by Barry Ostrager.

Amer, who declined to comment, presumably heard the Willis witnesses tell Silverstein's lawyers that the Travelers policy governed the World Trade Center coverage. He said as much in a Sept. 20 e-mail to Eric Roth, confirming that Willis believed that coverage was based on the Travelers form. "We await your approval to distribute the policy to the market," Amer wrote.

So how could Ostrager later assert that Wachtell was pushing to get the Travelers policy out, that Wachtell Lipton lawyers were manipulating Willis witnesses to tell a story that favored Silverstein? Ostrager says he never talked to Amer about those meetings. To protect Willis' attorney-client privilege, he says, Simpson Thacher -- which had informed Willis from the start that it would be representing a carrier in the litigation -- erected a wall between Amer and the lawyers representing Swiss Re. When Ostrager wrote the brief accusing Wachtell of "unconscionable interference" and "corruption of the discovery process," he based his accusation on notes Travelers underwriter Coyle took during a post-Sept. 11 conversation with Willis broker Boyd in which Boyd complained about feeling so much pressure from the lawyers that he was thinking of quitting. The comment later turned out, however, to have been a reference to Willis in-house lawyers, pressing Boyd to produce documents.

Epstein Becker's Gerson, the lawyer who replaced Amer soon after those initial meetings, also rejects any suggestion that Willis witnesses were coerced, in the Sept. 17 meeting with Wachtell Lipton lawyers or in any meeting after that. "I have been at every single [deposition] prep session," Gerson says. "There has been no pressure of any kind put on any Willis witness by anyone at Wachtell. I wouldn't let that happen. I am not a potted plant."

Ostrager says he never meant to suggest that Wachtell Lipton lawyers had suborned perjury, merely that in hours of preparing Willis witnesses for deposition, Wachtell Lipton partners had subtly shaped their recollections and perspectives. (Willis, insurance lawyers have noted in court, may be concerned about the possibility of Silverstein suing the brokerage for malpractice.) Immediately after Boyd's deposition testimony about pressure from lawyers, Ostrager did notify Judge Martin that Boyd had been referring to in-house lawyers, not Wachtell; and he did tell the judge in a letter and in court that he wasn't accusing Wachtell of impropriety. But he didn't withdraw his brief. And he doesn't believe that Wachtell is as indignant about his tactics as Wachtell says he is. In a deposition of Blackmore, Ostrager told Wachtell that he was going to call the judge if Wachtell didn't stop interrupting his questions. "If you want to be a litigator," Wachtell retorted, "don't be so thin-skinned every time you get an objection." Says Ostrager: "That applies in spades to him. [Wachtell and his partners] want to be aggressive, but, like any bully, they don't want to be punched back."

Ostrager came into the World Trade Center insurance case at around the same time Wachtell did, within two days of the collapse of the towers. Swiss Re wasn't necessarily expecting litigation, Ostrager says, but retained him "as a matter of prudence." As Willis circulated the Sept. 14 Travelers policy to the other insurance companies, Swiss Re's prudence proved justified. Swiss Re, as well as a host of other carriers, notified Willis that they'd bound coverage on the basis of the WilProp form, and had never agreed to substitute the Travelers form at all. The Travelers policy, they said, wasn't their policy; many said that the Willis notice was the first they'd heard of it.

For a few weeks, Ostrager and his second-in-command, Mary Kay Vyskocil, let Silverstein set the course of the case. The real estate developer badly wanted to begin collecting the business interruption portion of his insurance, so that he could continue making payments to his lenders and his landlord, The Port Authority. Wachtell urged a meeting between Silverstein and the insurers. Willis executives organized a session on Oct. 2 at Manhattan's Metropolitan Club. "I thought it would be helpful if Larry could talk to them, let them see him in the flesh, show them he was not trying to get a windfall," Wachtell says. "We told them we understood there was a difference of opinion on occurrence, but we had to get the business interruption insurance going. Larry said, 'We ought to be sitting down and talking.' He was met with dead silence."

Ostrager regarded the meeting as a turning point. "I knew what was going on in that Oct. 2 meeting," Ostrager says. Silverstein wanted the business interruption cash, Ostrager says, to fund his two-occurrence litigation. "It was transparent and self-evident," Ostrager says. "I knew to a moral certainty that Silverstein was going [to use the business interruption money] to initiate a declaratory judgment action against the insurers." So Ostrager and Vyskocil grabbed control of the litigation. On Oct. 22 they filed, on behalf of Swiss Re, a complaint for a declaratory judgment against Silverstein, asking the court to hold that the Trade Center disaster was, for insurance purposes, one occurrence. Ostrager admits that not all of the other insurers were happy about his suit. "There was a band of reactions ranging from 'We would have wanted to participate' to 'We would have appreciated it if you had consulted us,'" he says.

The Silverstein side portrays Ostrager as a litigation outlaw, infuriating the other insurers with overly aggressive tactics, starting with that declaratory judgment action. Lawyers for most of the other major insurers declined to comment publicly but insist privately that all of the insurers are working together. "There's a high level of cooperation," says Travelers counsel Harvey Kurzweil of New York's Dewey Ballantine, who, along with his partner Saul Morgenstern, has become a spokesman for the other insurers. "We've put on a

remarkably cohesive, coordinated [case]." And a successful one, so far. Though Ostrager has sometimes been alone at the extremes of the case, the insurance lawyers have united on major motions. As Ostrager had predicted, in January, Silverstein did file suit against all of the insurers, seeking a summary judgment against Travelers. Gross and the Wachtell Lipton team asked Judge Martin for a ruling that, as a matter of law, the World Trade Center disaster constituted two occurrences under the Travelers policy. Martin denied Wachtell's summary judgment motion, and, on another heavily litigated pre-trial issue, granted the insurers' motion to compel testimony from the Willis witnesses about their meetings with Wachtell.

Judge Martin seems eager for the case to settle, and has appointed federal Judge Lewis Kaplan to oversee talks, the first since a few utterly fruitless sessions late last fall. (Silverstein did settle with the two Bermudan insurance companies that explicitly mentioned the WilProp form in their binders. Those insurers agreed to pay, in cash, their policy limits for one occurrence, a total of about $350 million.) Proskauer's John Gross is still hoping for a deal; after all, if Silverstein can get anything more than his $3.55 billion one-occurrence limit, he's won. (Silverstein has stated repeatedly that he intends to use the insurance money to rebuild lower Manhattan.) Harvey Kurzweil says that Travelers and the other insurers would participate in talks; he is one of four insurance lawyers who was scheduled to meet with Wachtell Lipton partner Meyer Koplow in late August. Ostrager was also supposed to participate. One senses his heart wouldn't be in it, though. There's only one place Ostrager wants to be on Nov. 4: in Judge Martin's courtroom, picking a jury of New Yorkers whose votes he and Herb Wachtell can fight for.