Reports indicate that insured losses from the Southern California Woolsey fire will total at least $2.5 billion. The total economic loss from the Woolsey fire is estimated to be anywhere from $4 to $6 billion, according to Corelogic. The combination of expensive materials, a shortage in the construction workforce, and a high demand to rebuild will yield an expensive result.

This event is shaping up to be another example of a trend. Because of the devastating amount of damage caused by fires, floods, and hurricanes, it will cost a lot more to rebuild than is covered under applicable insurance policies. When there is simply "not enough insurance," the challenges to resolving claims successfully are exceedingly complex.

At the same time, immediately following such disasters one cannot avoid the plaintiff’s bar’s educational "workshops" on filing insurance claims not only on homes that were lost due to the fires, but also on those homes affected by smoke damage, loss of electricity, and more. Increasingly, novel theories of liability are being brought against parties thought to be safer exposures in an effort to boost recoveries. Essentially, more parties are being brought into lawsuits in an effort to expand the dollars to make the aggrieved whole.

As the plaintiff’s bar pushes the proverbial envelope, those impacted by the catastrophic events of nature may be drawn to the idea of litigation that involves new theories and parties. For the defense, efforts to double down on early resolution are paramount. No one wants to be the last party standing, but avoiding that is easier said than done.

These trends are emerging and evolving in the context of climate change. Whether you subscribe to the precept that global warming is giving rise to aggressive changes in our weather or not, the unavoidable fact is that extreme weather events are the harbinger of the claims made today and the lawsuits of tomorrow. And construction exposures in areas shaped by weather-related disasters, thought to be the hallmark of climate change, are the latest front in "not-enough-insurance" litigation.

Why Weather-Related Disasters are Litigation Fodder
After a weather-related disaster, the media often provides impactful visuals of human suffering and property damage, and often ascribes causation. Mechanisms of failure are explained on social media and through other channels. Sympathetic stories are widely covered, making it impossible to shield potential jurors from climate-event damages.

Recent climate events in 2018 and 2019 widely publicized in all forms of media include:

- The Camp Fire in Northern California destroyed an entire city resting on the edge of a tinder box with limited egress.
- The Woolsey Fire in Southern California destroyed homes, many of which have now been burned down multiple times and rebuilt—under stricter
The Natural Progression of Natural Disasters

Building codes but without additional bells and whistles that could increase the chances of withstanding a wildfire.

- A six-foot-high highway divider in Louisiana was erected for safety, but unexpectedly caused flooding in an entire city when it turned into a six-foot dam. One side of the road and adjacent property flooded while the other side was left substantially drier.
- Hurricanes in Texas and Florida generated a flurry of claims—first and third party—and raised complex coverage issues, and now first- and second-generation lawsuits.

These events, and the media exposure they get, create a perfect storm for the plaintiff’s bar, which is racing to maximize whatever insurance and assets are available. Weather-related construction claims also raise issues of public safety and become opportunities for plaintiff’s attorneys to advance reptile tactics and trial strategies.

Evolving Plaintiff’s Bar Tactics

As mentioned, a burgeoning plaintiff’s bar is developing novel theories of liability against a whole host of parties after weather-related events. Some of these theories potentially have legs while others are easy prey for a skilled defense counsel.

These theories of liability not only test governmental immunities, but also implicate contractors and ancillary players in the construction sequence, including those involved in the maintenance of structures. Unique theories of liability are being advanced against design professionals for allowing construction in the first place, or for not having the foresight to prevent conditions from either occurring or from being exacerbated. At the end of the day, many of these theories find receptive audiences with the triers of fact.

At a minimum, weather-related events test as-built conditions and fuel the debate over whether the damage was caused by an Act of God or exacerbated by existing construction defects—or both.

Overlay these claims with coverage issues—which range from trigger issues (when the damage occurred) to number of occurrences—and you have a volatile mix of both defect and coverage disputes. Adding further complexity to these claims, first-party carriers are aggressively pursuing their own subrogation claims following weather events in efforts to be made whole.

Commercial-contractor and design-professional claims will involve new theories brought—some theories of liability will be claims against commercial contractors and design professionals who never touched or worked on the homes in question. In Houston, a homeowner who lost his home to flooding during Hurricane Harvey sued 50 parties, none of whom worked on his house, but all of whom performed roadwork, grading, and levee and reservoir management in the area near his home. Efforts to certify class litigation should be anticipated.

For smoke and debris damage, we see another genre of claims akin to toxic-tort theories for respiratory ailments and allergic-type reactions, with first-party and construction-related claims blending together.

Worsening Wildfires and Emerging Issues

Nearly one in three California homes lies in the wildlife-urban interface—in or near dense vegetation, and at higher risk in a state that has seen 14 of its 20 most destructive fires since 2007. Some four million homes are in zones especially vulnerable to wildfires. Cal Fire estimates that as many as three million homes lie within the state’s “fire hazard severity zones.”

A landmark 2008 building code focusing on California’s fire-prone regions took the life-safety issues posed by fires into account by requiring fire-resistant roofs, siding, and other safeguards. But it stopped short of requiring additional measures that would have added to the expense of new construction.

Measuring the success of the new code in view of the past fires is challenging. Consider, however, that approximately 51 percent of the 350 single-family homes built under the 2008 code in the path of the Camp Fire were undamaged, compared to only 18 percent of the 12,100 homes built prior to 2008.

For the damaged homes, the plaintiff’s bar is raising the question of whether meeting current codes are enough, questioning if there is a higher obligation to build with more fire-resistant materials in these areas. There is no question this is possible, but it is more expensive.

For homes being rebuilt following a wildfire, the question becomes if meeting the 2008 building-code requirements is enough, given recent events throughout the state. In areas like Paradise, California, which sorely needs affordable housing, will increased construction costs deter rebuilding and result in an escalation of the homeless?

Moreover, consider that in each area impacted, the availability of insurance is becoming either restricted or more expensive, particularly after wildfire events.

Consumers are electing to go with less coverage, higher retention points, or go bare.

This decision makes the scramble to recover from any possible party appealing. This is not to say the claim will be meritorious by any measure.

Hurricanes—Acts of God or Construction Defects Exposed?

New Orleans was decimated by Hurricane Katrina. More recently, Florida and Texas were battered by hurricanes. Each event brought widespread flooding and unimaginable damage. These are Acts of God, certainly, and many would suspect these natural disasters would not give rise to claims that impact the construction industry. However, claims are indeed developing.

Following a hurricane, it is not uncommon for the plaintiff’s bar to claim that the damage was greater than what it would have been had the property been free of construction defects. This has huge consequences for risk managers, claims professionals, and counsel.
Assessment of the primary cause of the damage is critical: Was the hurricane the sole cause of the damage, or was the damage caused in part by defects or a lack of maintenance? Keep in mind that the areas where hurricanes strike may already subject to significant moisture, which could challenge the as-built conditions. This tactic by the plaintiff’s bar gives rise to the proverbial “battle of the experts” to determine causation.

In addition to uncovering new defects that are allegedly responsible for damage suffered during a hurricane, existing pre-hurricane defect claims may also evolve after a storm. Here, the allegations focus purely on the cost of repair. Plaintiffs argue that these costs increase dramatically due to the natural disaster, which may be true for labor and material costs given the supply/demand equation following such events. Claims may also expand in scope due to the discovery of additional defects uncovered as a result of the hurricane damage.

Taken together, these post-storm defect claims present interesting causation issues for claims professionals and coverage counsel to dissect: Was the damage caused by defects, the hurricane, the flood, or some combination of these factors? With any catastrophe-related claim, property that is the subject of an existing construction-defect claim may be destroyed or damaged beyond repair. What remains to be repaired due to a construction defect is fodder for the expert battle.

Logical minds would dictate that when Acts of God come into play, first party policies designed for that very peril would respond. Then again, logic does not always resolve claims. At the same time, depending on the interplay of policies and competing claims, it is not unimaginable that some defect claims will be withdrawn. Will first-party insurers pursue subrogation claims and, if so, what is the evidence that will support such claims?

Jurisdictionally specific issues add another dimension to these claims. For example, Texas is an injury-in-fact trigger state, so there will be coverage issues regarding when the damage occurred. Claims open under current policies that are in effect at the time of the hurricane are likely to be impacted the most for the simple reason that the most damage occurred during their effective periods.

Mixed Claims Grow from Statute of Repose
After major wildfires, construction-defect lawsuits against the builders of the affected homes are among the claims that are typically filed. However, California has a 10-year statute of repose that applies to construction-defect claims, meaning many homeowners find themselves potentially statutorily barred from filing these claims.

In those cases, they may attempt to file other claims. Bodily-injury claims are prime for this genre of litigation. For example, California has a statute of limitations of two years for personal injury claims. In these next two years, builders, product manufacturer and carriers may find themselves defending allegations of bodily injury claims on products that are well past the construction defect statute of repose.

This will prove to be problematic for builders who may not have all the information, records, contracts, subcontracts, and more, on hand to prepare themselves for these kinds of claims. When the alleged victim is a minor, defendants may be expected to hold on to their records for an even longer amount of time, since the statute of limitations does not start ticking until they reach the age of majority.

In addition to bodily-injury claims, there may be professional-liability claims brought forth not only against those involved in designing and building the homes, but also against those involved in designing and building the cities affected by the wildfires. Insurance agents who placed policies squarely at issue may also be in the crosshairs.

When there is not enough insurance, there is a natural inclination to examine all potential sources of recovery with a creative vigor. Many of these paths are dead ends, and the reality is there simply may not be enough insurance to make the affected homeowners whole. Juxtapose this with constant media coverage of climate events, a tainted jury pool, and sympathetic facts and it is easy to see that construction-defect litigation may well take a new turn in 2019 and beyond.

Stephen Henning is a founding partner of Wood Smith Henning & Berman LLP. shenning@wshlaw.com

Phyllis Modlin is a Claims Manager with Markel West Insurance Services in Woodland Hills, California. pmodlin@markelcorp.com