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FINALIZED RULES FOR SMALL UNMANNED AIRCRAFT SYSTEMS



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By Andrew L. Smith

So what exactly is a drone? I am sure we have all heard drones discussed lately, whether they are in the news or your “techy” neighbor just received one as a gift. These small aircrafts have two key features: (1) they lack an onboard human pilot; and (2) they are remotely operated. Drones are already used in many ways, including the insurance industry, the construction industry, and by law enforcement. They come in all shapes and sizes — ranging from recreational toys customers can buy at their local convenience store, to high-powered, military-grade weapons.

It's a Booming Business

The Federal Aviation Administration (FAA) determined drones, or Unmanned Aircraft Systems (UAS), are “currently the most dynamic growth sector within the aviation industry.” By 2020, it is estimated that about 30,000 small unmanned aircrafts will be used for all types of business purposes. Currently, the FAA has allocated \$63.4 billion for the modernization of the country’s air traffic control systems, as well as an expansion of airspace to accommodate the commercial use of drones. The Teal Group’s 2012 market study expects total spending for drones worldwide to reach \$89.1 billion over the next 10 years, including significant military and commercial demand.

According to the FAA, incidents involving unauthorized and unsafe use of small, remote-controlled aircraft have risen dramatically. Pilot reports of interactions with suspected unmanned aircraft have increased from 238 sightings in all of 2014 to 780 through August of 2015. Last summer, the presence of multiple drones in the vicinity of wild fires in the western U.S. even prompted firefighters to ground their aircraft on multiple occasions.

Recent and Finalized FAA Regulations

Recognizing this growing demand to expand the use of drones into new areas of use, Congress mandated in 2012 that unmanned aircrafts be integrated into the national airspace by 2015, which still has not been completed. However, as of June 21, 2016, the FAA finally released “Part 107,” the first operational rules governing routine commercial use of small UAS. Part 107 takes effect on Aug. 29, 2016.

Under the brand new regulations, a small UAS:

- Must weigh less than 55 pounds;
- Must remain within the visual line-of-sight of the remote pilot in command;
- May only operate during daylight times or civil twilight (30 minutes before official sunrise to 30 minutes after official sunset, local time) with appropriate anti-collision lighting;
- Must fly no higher than 400 feet above ground level and go no faster than 100 mph;
- Must operate during minimum weather visibility of three miles from control station; and
- Must be operated by a person with a remote pilot certificate. To obtain the required certification the person must: (1) be at least 16 years old; (2) demonstrate aeronautics knowledge by either passing an FAA knowledge test or completing FAA-approved training courses; and (3) be vet-

ted by the Transportation Security Administration.

Under the regulations, FAA airworthiness certification is not required. However, the remote pilot in command must conduct a preflight check of the small UAS to ensure it is in a condition for safe operation. As additional safety precautions, a remote pilot in command must:

- Make available to the FAA, upon request, the small UAS for inspection or testing, and any associated documents and records required to be kept under the rule; and
- Report to the FAA within 10 days of any operation that results in at least serious injury, loss of consciousness, or property damage of at least \$500.

In addition, pursuant to Part 107, transportation of property for compensation or hire is permissible if:

- The aircraft, including its attached systems, payload, and cargo weigh less than 55 pounds;
- The flight is conducted within visual line-of-sight and not from a moving vehicle or aircraft; and
- The flight occurs wholly within the bounds of a state and does not involve transport between: (1) Hawaii and another place in Hawaii through airspace outside Hawaii; (2) the District of Columbia and another place in the District; or (3) a territory or possession of the U.S. and another place in the same territory or possession.

Exactly how the new FAA drone regulations will work in practice in the commercial context remains to be seen. However, the finalization and release of Part 107 is a substantial step forward, which the drone industry has been waiting on since 2012.

State Legislation

In 2013, Idaho became the very first state to regulate the use of drones. Last year alone 45 states considered 168 bills related to drones. Common issues addressed in the legislation include defining: (1) what a UAS, UAV, or drone is; (2) how

they can be used by law enforcement or other state agencies; (3) how they can be used by the general public; and (4) regulations for their use in hunting, fishing, and recreation. Twenty-six states now have drone laws in place, and this number will continue to grow.

For instance, Florida's Freedom from Unwarranted Surveillance Act prohibits drone usage to obtain information about another while he or she is located on privately owned real property, unless one of the limited exceptions is met. *See* Florida Statutes, Section 934.50. The law took effect on July 1, 2015. Under the act:

- A law enforcement agency may not use a drone to gather evidence or other information.
- A person, a state agency, or a political subdivision may not use a drone equipped with an imaging device to record an image of privately owned real property or of the owner, tenant, occupant, invitee, or licensee of such property with the intent to conduct surveillance on the individual or property captured in the image in violation of such person's reasonable expectation of privacy without his or her written consent.
- An aggrieved party may initiate a civil action against a law enforcement agency to obtain all appropriate relief to prevent or remedy a violation of the act.
- The owner, tenant, occupant, invitee, or licensee of privately owned real property may initiate a civil action for compensatory damages for violations of the act and may seek injunctive relief to prevent future violations of the act against a person, state agency, or political subdivision.
- Evidence obtained or collected in violation of the act is not admissible as evidence in a criminal prosecution in any court.

The following provides a sampling of the various state regulations on point. Mississippi specifies that using a drone to commit "peeping tom" activities is a felony. Nevada prohibits the use of drones within a certain distance of critical fa-

cilities and airports without permission. Tennessee makes it unlawful to use a drone in fireworks displays without the event operator's consent. West Virginia prohibits people from using drones or other UAS to hunt, kill, or take a wild bird or animal.

Potential Defendants

Insurers also need to consider possible defendants in any litigation arising from the use of a drone, including the FAA; the drone owner; the pilot; product manufacturers; software designers; or even training facilities. Theories of liability could include negligence; breach of contract; breach of warranty; product liability; strict liability; trespass; conversion; trespass to chattels; invasion of privacy; and statutory causes of action under the new state statutes of future FAA regulations.

Invasion of Privacy Concerns

An obvious concern regarding the use of drones is the invasion of privacy. In Kentucky, for example, a man was charged with criminal mischief and wanton endangerment in Bullet County (pardon the pun) after shooting down an \$1,800 aerial camera, which he claimed was hovering above his sunbathing 16-year-old daughter in the family's backyard. The judge later dismissed the charges. Instances such as this are sure to increase as consumers begin to purchase more and more drones. How will the general public handle drones flying over their private property?

Liability coverage generally includes protection for personal injury, which implicates coverage for invasion of privacy. Drones will fly over homes, your backyard, and other "personal" space, elevating the likelihood of invasion of privacy claims. Policies sometimes also include exclusions for trespass and nuisance.

Insurance Issues

Insuring drones is complicated. The following types of coverage will be needed: liability, personal injury, invasion of privacy, property and even workers' compensation.

The definition of the "insured vehicle" will be key to determining any coverage. For example, most standard CGL policies exclude coverage for bodily injury and

property damage resulting from the ownership, maintenance, or use of aircraft or from aviation operations. Most CGL policies also only cover commercial activities on the ground at the “registered premises” of the business and limited activity away from these premises.

The Aircraft Exclusion

Generally, the aircraft exclusion to a homeowners policy precludes coverage for “bodily injury or property damage arising out of the operation, maintenance, use, loading or unloading of an aircraft.” See Homeowners Policy, Form FP-7955. Likewise, the exclusion in a CGL policy precludes coverage for “bodily injury or property damage arising out of the ownership, maintenance, use or entrustment to others of any aircraft.” See CGL Policy, ISO Form CG 00 01 10 01-2000.

The aircraft exclusion has been applied to aircraft other than airplanes. See *Metro. Prop. & Cas. Ins. Co. v. Gilson*, 458 F. Appx. 609 (9th Cir. 2011) (ultralight vehicle); *Farmers Ins. Co. v. Daniel*, Case No. CIV-07-1421-C, 2008 WL 4372879 (W.D. Okla. Sept. 19, 2008) (helicopter); *Hanover Ins. Co. v. Showalter*, 204 Ill. App.3d 263, 561 N.E.2d 1230 (Ill. Ct. App. 1990) (airplanes, balloons, helicopters, kites, kite balloons, orthopters, and gliders).

While a drone is an “unmanned aircraft system,” this analysis may not be so straightforward. Is the term “aircraft” specifically defined in policy? Ambiguities are construed against the insurer and in favor of the insured. “Aircraft” is generally defined in a policy as “any contrivance used or designed for flight, except model aircraft or hobby aircraft not used or designed to carry people or cargo.” See Homeowners Policy, Form FMHO 943 (ed. 11-96) (ISO 1990). “Aircraft” is further defined in Merriam-Webster’s Dictionary as “a machine such as a airplane or a helicopter that flies through the air.” How the Aircraft Exclusion will be interpreted by courts pertaining to drone use has yet to be determined, but the above analysis is indicative of how courts will assess the issue.

Illegality Issues

Policy exclusions for illegal activities and criminal acts may also be implicated

with the use of drones, including invasion of privacy, illegal surveillance or filming, fishing and hunting, and transportation of illegal substances and drugs. Questions may also arise as to whether a drone was operated in violation of FAA regulations at the time of an accident.

Conclusion

The future is here! Drones comprise a growing multi-billion-dollar technological empire. How courts will interpret insurance coverage and liability issues associated with the use of drones is still unknown. Be sure to stay updated on the new FAA regulations for the commercial use of drones, which take effect later this month on Aug. 29, 2016.

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