



## **These Aren't the Drones You're Looking For**, *by Andrew L. Smith, Esq.*



So what exactly is a drone? I am sure we all have heard drones discussed lately, whether they are in the news or your “techy” neighbor just received one as a Christmas present. These small aircrafts have two distinct features not shared with the rest of the aviation marketplace: (1) they are unmanned, having no human pilot/operator onboard; and (2) they are remotely operated by a pilot using data link transmissions. Drones have the ability to house high-powered cameras, infrared sensors, facial recognition technology, and even license plate readers. 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.

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Insurers also need to consider possible defendants in any litigation arising from the use of a drone:

- The FAA could be sued for its authorization of operations in certain airspace.
- The owner of a drone could be sued on several bases, including negligent operation or negligent training or hiring of a pilot.
- The pilot could also be sued for his or her own negligence.
- Product manufacturers will also need insurance to guard against suits for software malfunctions, design and manufacturing defects, inadequate warnings, breach of warranty, or failure to comply with to-be-determined safety standards.
- Drone operation training facilities may be subject to liability.
- If a particular drone is deemed to be an ultra-hazardous activity, then parties may be subject to strict liability.

Indemnification, duty to defend, and duty to insure agreements will need to be drafted to protect interests among owners, operators, manufacturers, pilots, training, rental facilities, and property owners, as well.



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 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. 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 typically includes protection for personal injury, which also covers invasion of privacy. Drones will fly over homes, your backyard, and other "personal" space, elevating the likelihood of invasion of privacy claims. Policies may provide specific coverages or exclusions for trespass, nuisance, and invasion of privacy. This is certainly a factor in need of further consideration.

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.

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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.

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, 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.

The future is here! Drones comprise a growing multi-billion dollar technological empire. How courts will interpret insurance coverage issues associated with the use of drones is still unknown. Be sure to stay abreast of the pertinent FAA regulations, as well as your state’s legislation in this area.