These Aren't the Drones You're Looking For

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So what exactly is a drone? I am sure we have all have all 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.

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 forecasts that total spending for drones worldwide is expected to reach $89.1 billion over the next 10 years, including strong 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. During this past 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 several occasions.

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 happened. Currently, it is illegal to fly commercial drones in the United States, although the FAA is in the process of developing rules to regulate commercial flights of small drones. In the meantime, as the FAA works on drone regulations, the agency has already granted 1,546 exemptions for businesses to use the aircrafts.

The FAA recently issued proposed rulemaking on drones on February 15, 2015, specifying requirements for their general public use, including:

- Must weigh less than 55 pounds;
- May only operate during standard daylight hours and within visual sight;
- Must fly no higher than 500 feet and go no faster than 100 mph;
- Must be operated by a person at least 17 years or older that has passed a FAA knowledge test; and
- Must be registered, but does not require an airworthiness certification.

In 2011, for instance, the FAA penalized drone videographer Rapheal Pirker $10,000 for using a drone. Mr. Pirker challenged the fine, and a federal administrative-law judge overturned the penalty, saying there was no law banning the commercial use of small drones. It remains to be seen exactly when and how the FAA will finalize its drone regulations.

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 what a UAS, UAV, or drone is; how they can be used by law enforcement or other state agencies; how they can be used by the general public; and 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 the use of drones in gathering information about another while he or she is on privately owned real property, unless one of the limited, enumerated 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 facilities and airports without permission. Tennessee makes it unlawful to use a drone in fireworks displays without the event operator's consent. Utah allows a law enforcement agency to use drones to collect data at a testing site and to locate a lost or missing person in an area in which a person has no reasonable expectation of privacy. 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:

- 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.

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 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.

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 an 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, 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 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.