



Drones and Insurance: The Next Generation Commercial Carriers

by Samantha Riley

Abstract

The use of drones for various commercial purposes is rapidly expanding, leading to new risks and liabilities. This article discusses the newly imposed H.R. 636 regulations for commercial drone use, its potential impact on the duty of care owed by drone operators, and general insurance policy considerations for new and emerging risks.

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On December 1, 2013, Amazon's CEO, Jeff Bezos, announced that the company will eventually deliver products by drone, heralding the newest form of product delivery since the mailman. Since Amazon's announcement, other companies have followed suit, including Google with "Project Wing," which is set for takeoff in 2017; Facebook with its "Aquila" drone internet delivery; and even the U.S. Postal Service with its anticipated "Horsefly" drone fleet.¹

Subindustries spawn with every new technology, and the insurance sector responds in kind, offering specialized policies and endorsements to cover the new risks and liabilities. Drones are no exception. They need trained pilots, sound mechanics, safe data, and impenetrable technology.

This article discusses the federal and state statutes applicable to drones and the Federal Aviation Administration's (FAA) new drone regulations; drones as common carriers and the potential heightened duty of care that could arise; and the risks drones could create and the coverage of those risks under existing standardized insurance policies.

Federal Statutes

Until recently, drone businesses were grounded by the FAA ban on the commercial use of drones.² In 2012, Congress passed the FAA Modernization and Reform Act of 2012 (Public Law No. 112-95), which defined drones as "unmanned aircraft systems" (UAS) and "unmanned aircraft" (UA). However, this act provided only the regulatory framework for the private use of drones, excluding commercial drone use altogether. The act mandated that the FAA create and

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impose regulations that would assist safely integrating drones into national airspace by September 2015.

In response to Congress's demands in 2015 for new drone regulations, on June 21, 2016, the FAA finalized the first operational rules for routine commercial use of drones, which became effective on August 29, 2016 (Small Unmanned Aircraft Rule [Part 107]).³ Part 107 created certain drone operational limitations, including, among other rules, that drone users have a visual line of sight (VLOS) with their drone at all times, that drone operators cannot operate drones over people, and that drones can be used only during daylight or twilight hours. In addition, Part 107 required that a "remote pilot in a command position" hold a Remote Pilot Airmen Certificate with a UAS rating or that the operator be directly supervised by a person who holds the certificate.

Following the FAA's introduction of Part 107, on July 15, 2016, Congress passed new legislation permitting the use of commercial drones—U.S. Department of Transportation Federal Aviation Administration Extension, Safety, and Security Act of 2016, PL 114-190, July 15, 2016, 130 Stat 615 (H.R. 636). H.R. 636 provided the legislative and regulatory blueprints for commercial drone use, but left the details and the rulemaking to the FAA.

H.R. 636 sec. 2209(a) provided that the Secretary of Transportation establish a process to allow applications for the restriction or prohibition of drone operations in close proximity to fixed-site facilities.⁴ Fixed-site facilities include critical infrastructure, such as energy producers, transmission structures, equipment and distribution facilities, oil refineries, and chemical facilities, as well as amusement parks and any other locations that warrant drone restriction. Thus, private businesses can now apply to the administrator of the FAA for airspace restriction of drone use, and the applications promulgated by the secretary of transportation are then filed and approved or rejected.

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State Drone Laws

In addition to the preceding federal regulations, most states have enacted drone-specific laws governing the use and operations of drones. The rules and statutes vary widely regarding their intended impact and industries.

California, for example, amended existing privacy laws to prohibit drones from entering an individual's airspace to capture images or recordings of the individual engaging in private, personal, or family activity without permission.⁵ Florida prohibits the use of drones to capture images of privately owned property without consent.⁶ Michigan enacted a law that prohibits using drones to interfere with or harass an individual who is hunting or to take game or fish.⁷ Likewise, New Hampshire prohibits using drones to interfere with lawful hunting, fishing, or trapping activities.⁸ Vermont and Oregon prohibit any person from operating a drone capable of firing a projectile or in a way that causes it to function as a dangerous weapon.⁹ As of July 2016, twenty-nine states had enacted laws addressing drones, while other states had pending legislation.

Duty of Care and Common Carriers

Drones are used for vast and varied commercial purposes. They are used to aid in the quick visibility of land—land used in agriculture, land scorched by fires, and land impacted by other catastrophic disasters. Drones are used, for example,

to provide real estate purchasers with real-time views from the sites of unbuilt apartment buildings in Manhattan,¹⁰ for crop scouting,¹¹ for motorsports and automobile marketing,¹² and for wedding photography.¹³ With increased use comes the increased risk of harm to people or property if something goes wrong.

The enactment of H.R. 636 does not create a heightened duty of care for drone users. Similarly, of the twenty-nine states that have passed corresponding drone laws, none of those states have created a statutory heightened standard of care for drone users. However, using the treatment of commercial delivery vehicles as a roadmap, it seems possible that a heightened duty of care might arise in the future.

Several state and federal laws recognize the heightened standard of care for all common carriers. A "common carrier" is any business operating in the transportation of goods or people.¹⁴ Federal commercial transportation regulations have provided heightened standards of care for common carriers for decades.¹⁵ For example, under the Commercial Motor Vehicle Safety Act (Section 302.700.2), operators of commercial motor vehicles are required to use "extreme caution" under certain conditions, such as during inclement weather or when hazardous conditions exist, creating a heightened duty of care.¹⁶ In the future, drones may also be considered common carriers, given their anticipated use for all manners of business, including the delivery of commercial goods by Amazon and other companies.

Companies that operate or pilot drones for commercial delivery may not be the only businesses that could be subject to a heightened standard of care. Subindustries that have emerged during the advancement of drones are drone piloting schools and drone manufacturers. These industries could also be subject to heightened

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standards of care, creating new thresholds for liability. For example, despite Uber's company view that it is merely a software company, in a recent decision, the Northern District of California found that Uber qualified as a common carrier and was subject to all obligations that arise with this classification.¹⁷ Even though new technology is used in new ways, tried and true applicable legal standards still apply.

As previously described, the federal government has implemented an application process for businesses to restrict their airspace from drone use. The issue for businesses and their insurers alike is whether they should seek such an application. Conceivably, a new obligation could arise, or be argued in a later lawsuit, that the failure to seek a restrictive application was unreasonable or fell below the standard of care for a particular property, company, or industry.

If a drone disrupts operations at an amusement park and interferes with a roller coaster, is the business's failure to secure a restriction on drone use negligence? Such an allegation is conceivable. While business executives review their network data and cyber security vulnerabilities and their available insurance options, brokers, insureds, and insurers may want to consider whether companies need to seek a formal restriction of the use of their airspace to commercial drones.

Moreover, one can easily see the factual issues that could arise regarding compliance with the rules mandating remote pilot certification or supervision in any claims or lawsuits that follow a drone-related incident. While no heightened duty of care exists yet, plaintiffs will rely on both state common law and state and federal regulations to establish evidence that the duty of care owed in the use or operation of a drone fell short of the standard of care—or, in other words, that negligence existed.

Insurance Requirements

Insurance requirements for the commercial

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use of drones are not included in H.R. 636 or in the new Part 107 regulations. However, businesses using drones for commercial purposes should purchase relevant insurance. Many insurance companies, both large and boutique, offer drone insurance. Notably, the FAA requires insurance for common carriers; thus, any judicial finding that a drone operator is a common carrier could lead to other implications.¹⁸

In June 2015, Insurance Services Office, Inc. (ISO) developed new drone endorsements in response to emerging risks involving commercial and private drone use.¹⁹ Those endorsements include commercial general liability and commercial liability umbrella and excess endorsements; commercial inland marine drone endorsements; and commercial property, capital assets, and Agri-CAP drone endorsements.

Drones and Existing Insurance Policies

The rapid expansion and use of commercial drones have created new insurance opportunities, as well as challenges posed by new and different liabilities. It is not too soon to consider drone-related claims or lawsuits that might be reported to commercial general

liability (CGL), professional liability, and cyber liability policies.

CGL policies typically contain an Aircraft, Auto or Watercraft exclusion that precludes coverage for “any bodily injury or property damage arising out of the ownership, maintenance, use or entrustment to others of any aircraft, auto, or watercraft owned or operated by or rented or loaned to any insured.”²⁰ The FAA has defined drones as “unmanned aircrafts” for the purpose of applying certain aviation-related statutes and regulations. Therefore, any potential liability involving the use of drones is likely to be excluded under the typical CGL policy exclusion, absent any specific endorsements providing coverage. This would be true even if drone operators qualify as common carriers, as the exclusion has been applied in that context to other vehicles.

Regarding professional liability, companies now need to connect with qualified drone pilots to deliver their products to their customers. Massachusetts-based start-up Fly4Me has launched nationwide services that connect individuals and business owners with Fly4Me-approved drone pilots.²¹ The company requires each pilot to pass a basic skills test.²²

A professional liability policy typically provides coverage for any loss caused by the negligent performance of professional services. To the extent that drone operators purchase professional liability policies and are otherwise deemed “professionals” under a policy, coverage would likely be provided if the professional operating the drones did so while performing his or her professional services.

For businesses currently using drones, including architecture and construction companies, their professional liability policies would likely provide coverage absent any relevant exclusions. Delivery-by-drone enterprises will likely need to employ drone pilots who, pursuant to Part 107, are certified

as remote pilot airmen. Therefore, these pilots would likely be found to be “professionals” and could be granted coverage under traditional professional liability policies, absent any specific exclusion. In addition, failure to have or maintain the required certificates could become evidence relevant to the standard of care.

For technology-related issues, cyber policies are designed to cover data and network security issues. It is conceivable that drones could be used to access information maintained by businesses in a manner that makes exposure susceptible to the use of a drone, either through its visual or computer capabilities. Moreover, drones are at risk of having their own systems hacked. Typically, under cyber policies, the manner in which data is exposed or accessed is not the mechanism by which the policy’s coverages are triggered. Thus, absent specific exclusions, a cyber policy may cover drones that obtain personal information or drones that are hacked for their personal information.

Slurpees from 7-Eleven are now available by drone delivery to your door.²³ The insurance industry, government, and personal injury attorneys are watching, preparing, regulating, and insuring this new and emerging technology. The legal and regulatory environment for commercial drone use is evolving. Manufacturers, users, trainers, and businesses should keep a close eye on current regulations and the anticipated implementation of additional state statutes that will impact drone use. Although H.R. 636 does not provide a heightened duty of care, the pilot certification regulations and use of future delivery commercial enterprises will leave plaintiffs and courts likening the new-age delivery businesses to common carriers, opening the door for risks and corresponding insurance issues. Strategically, an ounce of prevention is worth a pound of cure; both insurers and their insureds should implement appropriate protocols and protections now before the risks become reality. ■

Endnotes

1. See www.solveforx.com/projects/wing/, www.facebook.com/Aquila-Drone-473893542788014/, and <http://workhorse.com/aerospace>.
2. As of February 2007, as set forth in the Policy Statement of FAA Notice 07-01, the FAA’s policy was that for an unmanned aircraft system (including a model aircraft used for business purposes) to operate in the national airspace system, specific authority is required—a special airworthiness certificate. See N.T.S.B. (2014) at www.popsci.com/article/technology/judge-strikes-down-faa-ban-commercial-drones; also see www.provideocoalition.com/drone-law-update-faa/ for an explanation of how the FAA restrictions and rules were a barrier to entry in the unmanned aerial systems industry.
3. See Federal Aviation Administration, FAA News, and Summary of Small Unmanned Aircraft Rule (Part 107), available at www.faa.gov/uas/media/Part_107_Summary.pdf and www.faa.gov/news/updates/?newsId=86305.
4. For more information, see www.congress.gov/bill/114th-congress/house-bill/636/text.
5. Cal. Civ. Code § 1708.8 (2016).
6. Fla. Stat. Ann. § 934.50 (2015).
7. Mich. Comp. Laws Ann. § 324.40112 (2015); Mich. Comp. Laws Ann. § 324.40111c (2015).
8. N.H. Rev. Stat. Ann. § 207:57 (2016).
9. Vt. Stat. Ann. tit. 13, § 4018 (2016); Or. Rev. Stat. Ann. § 837.365 (2016).
10. See www.skycamusa.com/realstate.shtml (offering aerial media for real estate marketing).
11. See www.sensefly.com/applications/agriculture.html.
12. See www.propheadsphoto.com/air-support.
13. See <http://chipdizardweddings.com/drone/>.
14. See *Gomez v. Superior Court*, 113 P.3d 41 (Cal. 2005) (finding an operator of a roller coaster could be considered a carrier of persons and therefore was subject to a statutory heightened duty of care).
15. For example, see 49 C.F.R. § 392.14 (2016) (Hazardous Conditions; Extreme Caution, established December 25, 1968).
16. See *Weaver v. Chaves*, 35 Cal. Rptr. 3d 514 (Cal. Ct. App. 2005) (providing that federal regulation requiring operators of commercial motor vehicles to use “extreme caution” under certain conditions imposes a higher duty of care).
17. See *Doe v. Uber Techs., Inc.*, 2016 WL 2348296, at *9 (N.D. Cal. May 4, 2016) (holding that plaintiffs alleged sufficient facts to “plausibly claim that Uber is a common carrier”).
18. 14 C.F.R. § 205.3 (2004).
19. See www.verisk.com/press-releases-verisk/2015/june-2015/iso-drone-insurance-coverage-options-take-effect-this-month.html.
20. CG 0001 04 13 form, Coverage A, Exclusion g.
21. See <http://fly4.me/>.
22. See <http://fly4.me/#how-it-works>.
23. See <https://sites.7-eleven.com/news/07-22-2016-7-eleven-teams-with-flirtty-for-first-ever-faa-approved-drone-delivery-to-customer-s-home>.



Samantha Riley, JD, is a partner at Nicolaidis Fink Thorpe Michaelides Sullivan LLP. She has represented insurers and reinsurers, including syndicates within Lloyd’s of London and other international insurance companies, in complex coverage disputes for more than 13 years. She focuses her practice on cyber risks under cyber liability, technology, media, professional, and specialty policies, and professional liability and management policies.