Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Insurance Considerations Amid Increased Use Of Drones

By **Marialuisa Gallozzi, Laura Beth Cohen and Sean Bender**
(October 22, 2021, 4:07 PM EDT)

Marialuisa Gallozzi

Laura Beth Cohen

Sean Bender

From remote delivery to spraying disinfectant to surveillance, the COVID-19 pandemic spurred innovative new uses for unmanned aerial vehicles, or UAVs, more commonly known as drones.

During the same period, the Federal Aviation Administration completed some key regulatory initiatives to integrate drones into commerce while promoting public safety. We discuss below the new functions, new regulations and new risks of drone technology.

New Uses

Remote-controlled flight is an old idea. The U.S. Army began testing radio-controlled pilotless airplanes in 1917, just 16 years after the Wright brothers' first flight. By some estimates, the U.S. Department of Defense's drone procurement budget will approach $100 billion by the end of the decade.[1] The FAA estimates that there are currently 1.7 million active recreational and commercial drones, a figure it expects to grow to 2.31 million by 2024.[2]

The insurance industry also was an early adopter of UAV technology. Since 2018, insurers have accounted for almost 20% of commercial drone use, relying on drones to reach areas otherwise inaccessible to claim adjusters.[3] When COVID-19 halted many other commercial operations, drones allowed insurers to continue adjusting claims.

The pandemic spurred new and expanded drone uses. Drone deliveries increased dramatically in the early weeks of the pandemic, as quarantined customers placed orders for baby food, coffee and — of course — toilet paper. Students received library books via drone delivery. Drones also have been used to deliver human organs for research, as roving internal home security cameras, and as a way for homebuyers to tour listings.

CVS Pharmacy Inc. began using drones to deliver prescription drugs to residents of a Florida retirement community. Pandemic-specific uses included the delivery of personal protective equipment to rural areas and testing of temperature-controlled

drone delivery for vaccines.

Governments and public health agencies also increased their use of drones in efforts to slow the spread of COVID-19. Several nations used drones to monitor compliance with shelter-in-place orders. China repurposed agricultural drones to spray disinfectant across public areas and used drones with infrared cameras to scan crowds for symptomatic individuals.

The rise of drones also has led to the rise of a parallel anti-drone industry, which markets tools to detect, track, jam and even destroy unwanted UAVs.

In 2018, a choreographed light show in Hong Kong was disrupted when almost half of the show's drones plummeted into Victoria Harbour.[4] The drone light show that illuminated then President-elect Joe Biden's victory speech on Nov. 7, 2020, fortunately escaped such a fate. Officials in Hong Kong blamed a powerful GPS jamming signal. U.S. law prohibits the use of most signal-jammers and GPS-spoofers by private persons.[5]

While the pandemic has spurred new uses for drones, it also has highlighted the challenges of regulating those uses, navigating those regulations, and scaling up from discrete headline-making pilot projects.

New Regulations

Regulators have been working to integrate both commercial and recreational UAVs into national airspace since the 2012 FAA Modernization and Reform Act. The FAA's most significant rulemaking to date occurred in 2016, when it provided the first legal framework for commercial drone operations, including by limiting drone operations to:

- Elevations under 400 feet and speeds below 100 miles per hour;
- Areas within the operator's line of sight;
- Daytime use; and
- Areas away from other aircraft, nonparticipating individuals, stadiums, sporting events and emergency response efforts.

The regulations also provided a licensing process allowing pilots to seek waivers of one or more of these restrictions. The FAA has also taken steps to regulate recreational drone use.

In the midst of the pandemic, the FAA issued two key final rules at the end of 2020. The first rule requires remote identification, referred to as a digital license plate, and the second rule permits certain operations over people.

Remote ID is the ability of a drone in flight to provide identification and location information that can be received by other parties.

According to the FAA:

> Remote ID will provide information about drones in flight, such as the identity, location, and altitude of the drone and its control station or take-off location. Authorized individuals from public safety organizations may request identity of the drone's owner from the FAA. [It] helps the FAA,

law enforcement, and other federal agencies find the control station when a drone appears to be flying in an unsafe manner or where it is not allowed to fly.[6]

The compliance date is Sept. 16, 2023.

The second rule released in December 2020 was the "Operation of Unmanned Aircraft Systems Over People" final rule.[7] It allows routine operations over people and at night under certain circumstances without requiring specific waivers from the FAA.

In January 2021, the FAA "approved the first fully automated commercial drone flights, granting a small Massachusetts-based company permission to operate drones without hands-on piloting or direct observation by human controllers or observers."[8]

Several state and local governments also regulate drone use, but these rules have faced legal challenges in large part because of their conflict with the federal rules. Additionally, several states have banned flights over infrastructure assets like pipelines and flights over prisons due to concerns about delivery of contraband.[9]

Several media organizations are currently challenging a Texas law banning surveillance by commercial UAVs, and restricting flights over critical infrastructure facilities at a height below 400 feet.

Because federal law prohibits flights above 400 feet, the Texas statute effectively prohibits all flights over these facilities. Plaintiffs in National Press Photographers Association v. McCraw, pending in the U.S. District Court for the Western District of Texas, argue that the statute violates the First Amendment and is preempted by FAA rules.[10]

New Risks

For all their advantages, drones create real risks for their owners, operators and the public. Although the FAA does not require UAV owners and operators to carry drone-specific insurance, some states do. We examine below how different types of insurance might respond to certain drone-related risks.

Third-Party Bodily Injury and Property Damage

One of the earliest drone-related lawsuits resulted from an incident in which a wedding photographer in California was sued after a drone hit a guest, causing her to lose vision in one eye. In the ensuing 2018 insurance coverage case, Philadelphia Indemnity Insurance Co. v. Hollycal Production Inc., the commercial general liability insurer sought a declaration of noncoverage.

The U.S. District Court for the Central District of California granted summary judgment for the insurer based on the policy's aircraft exclusion; however, the policy did not define the term aircraft, and the insured did not oppose the insurer's summary judgment motion, so the court may not have had the opportunity to consider the coverage arguments in depth.[11]

Similarly, Caesars Palace casino also was sued for bodily injuries when a drone used in a Fourth of July fireworks show crashed into the crowd and injured several spectators.[12]

Drones may also cause third-party property damage. In 2019, the National Transportation Safety Board received multiple incident reports describing aircraft damage following a drone collision, including

damage to a helicopter in flight.[13]

In January 2020, a University of Iowa research drone crashed into a mobile home park as it approached a municipal airport. In addition to the third-party liability, the loss to the owner and operator was estimated at $300,000.[14]

General liability insurers have begun to address these exposures with specific endorsements. Many commercial general liability insurers now include specific drone or "unmanned aircraft" exclusions, which were first issued by the Insurance Services Office Inc. — now Verisk Analytics Inc. — in 2014. The endorsement excludes bodily injury, property damage, personal injury and advertising injury "arising out of the ownership, maintenance, use or entrustment to others of any aircraft that is an 'unmanned aircraft."[15]

At about the same time, the Insurance Services Office also began offering endorsements covering drone operations. In addition, multiple insurers offer products designed for drone risks.

Privacy Torts

Drone-related threats to privacy have triggered other claims. For example, in October 2020, Prince Harry and Meghan, the Duchess of Sussex obtained a favorable settlement of a lawsuit alleging that pictures of their son Archie taken by a drone-mounted camera invaded their privacy. Such business torts are commonly covered by the personal injury component of a general liability policy.

For drones used in specific business pursuits — for example, newsgathering activities — a media liability policy that covers liability arising from the insured's collection of information, including videotaping or recording, may provide coverage. Insureds who use drones in their media operations should be on the lookout for any exclusions or other provisions limiting the devices or equipment through which information is collected.

Professional Liability, and Errors and Omissions

If a company is using drones as part of its operations, it should consider professional liability insurance or errors and omissions insurance. The insurance industry itself provides a good example. Insurer Liberty Mutual is currently in the U.S. District Court for the Eastern District of Louisiana defending its use of drones for adjusting claims in Bellina v. Liberty Mutual Insurance Co.[16]

The policyholder-plaintiff alleged that the insurer wrongfully denied her hail damage claim, and that the damage would have been readily apparent had the insurer sent an adjuster to look at her roof instead of relying on aerial photography.

Cyber Risks

Drones also face cyberthreats. The U.S. Department of Homeland Security has warned that, notwithstanding robust security precautions, drones could be used to extract network information or inject malware.[17] Security analysts have demonstrated the ability to hijack a drone midflight, risking not only data loss but also damage to property and injury to people.[18]

Cyber risk policies may cover third-party liability, first-party loss or both. These policies typically do not contain aircraft or similar exclusions, but many common cyber policy forms contain bodily injury or

property damage exclusions.

On the other hand, cyber policies should respond to cybersecurity breaches that expose or damage the insured's data or third-party data collected or transmitted not only via the drone itself but also via the system by which the operator communicates with the drone — collectively referred to as the unmanned aerial system, or UAS.

In this regard, it will be important for drone operators purchasing cyber risk policies to assess whether and to what extent key policy definitions, such as the definition of "computer system," extend to all the components of the UAS. Careful scrutiny of exclusions also will be necessary, including exclusions pertaining to the unauthorized collection of information.

Risk Management

Insurance is a key risk management consideration for owners and operators of drones or users of third-party drone services, who might suffer loss of the drone itself or its payload or liability to third parties. Because a single event can trigger multiple lines of coverage, a policyholder should consider not only its own coverage but also insurance that might be provided through the vendor when the vendor's operations expose the customer to liability.

For example, when contracting with drone operators, Karen Petty, director of Arthur J. Gallagher & Co. Aerospace Specialty Group, recommends (1) vetting the operator's qualifications and licensing, (2) obtaining a certificate of aircraft liability insurance and additional insured status on the operator's policy, and (3) obtaining excess or primary liability coverage that will respond in the event the operator's coverage does not.

Conclusion

Companies and individuals using drones for commercial and recreational purposes confront technology and regulations that have evolved rapidly during the pandemic. With increased use of drone technology comes increased exposure to third-party liability and first-party loss.

To manage operational, financial and legal risk, businesses and individuals need to address risks of drone operations — whether their own operations or third-party operations — through training and compliance, allocation of financial obligations in contracts, and transfer of risk to drone-specific insurance products or other types of insurance.

Some insurers are attempting to exclude drone-related risks while offering new specialty products or endorsements for additional premiums. These new exclusions and coverage grants can vary widely. They warrant close review. The tricky coverage questions that these novel drone-related risks present will likely keep mutating after the COVID-19 pandemic ends.

Marialuisa S. Gallozzi is a partner, Laura Beth Cohen is an associate and Sean Bender is a law clerk at Covington & Burling LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] https://www.nationaldefensemagazine.org/articles/2020/1/6/98-billion-expected-for-military-drone-market.

[2] https://www.faa.gov/news/press_releases/news_story.cfm?newsId=25620#:~:text=More%20than%201.7%20-million%20recreational,nation's%20airspace%20system%20(NAS).

[3] https://www.namic.org/pdf/publicpolicy/191031_final_drone_law.pdf.

[4] https://www.scmp.com/news/hong-kong/law-and-crime/article/2170669/hk13-million-damage-caused-gps-jamming-caused-46-drones.

[5] 47 U.S.C. § 302a; 18 U.S.C. § 1367.

[6] https://www.faa.gov/uas/getting_started/remote_id/.

[7] https://www.federalregister.gov/documents/2021/01/15/2020-28947/operation-of-small-unmanned-aircraft-systems-over-people.

[8] FAA Approves First Fully Automated Commercial Drone Flights, WSJ January 15, 2021.

[9] For a survey of US drone laws, see: https://www.911security.com/2020-drone-law-updated-report.

[10] Nat. Press Photographers Ass'n v. McCraw, No. 1:19-CV-00946 (W.D. Tex. filed Sept. 26, 2019).

[11] Philadelphia Indemnity Ins. Co. v. Hollycal Production, Inc., 2018 WL 6520412 (C.D. Cal. 2018).

[12] https://abcnews.go.com/US/drone-injured-womans-eye-las-vegas-casino-july/story?id=57358410.

[13] https://app.ntsb.gov/pdfgenerator/ReportGeneratorFile.ashx?EventID=20191019X10346&AKey-=1&RType=HTML&IType=CA.

[14] https://www.press-citizen.com/story/news/2020/01/23/faa-investigating-university-iowa-drone-crash/4554292002/.

[15] CG 21 09 06 15, Insurance Services Office, Inc. 2014.

[16] Bellina v. Liberty Mutual Ins. Co., No. 2:19-CV-13711 (E.D. La. filed Sept. 30, 2019).

[16] https://www.eisac.com/cartella/Asset/00007102/OCIA_-_Cybersecurity_Risks_Posed_by_Unmanned_Aircraft_Systems.pdf?parent=115994.

[17] http://www.assureuas.org/projects/deliverables/a4/ASSURE_A4_Final_Report_UAS_Ground_Collision_-Severity_Evaluation.pdf.