



Recent Legal Developments on the Use of Drones – Episode #121

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John Czuba: Welcome to the “Insurance Law Podcast,” the broadcast about timely, and important legal issues affecting the insurance industry. I’m John Czuba, Managing Editor of *Best's Recommended Insurance Attorneys*.

We’re pleased to have with us today, Attorney Tim Crawley from the law firm, Anderson Crawley & Burke in Ridgeland, Mississippi. Tim is a member of various associations, including DRI, the Claims and Litigation Management Alliance, Insurance Committees, and a member of Your House Counsel.

Tim has also served as a faculty member for a variety of seminars dealing with issues related drones, and he’s presented on this topic both in the US, and in London. Tim has also appeared in an A.M. Best two part webinar series in 2015 on examining the legal claims and risk issues of drones.

Today’s discussion focuses on the most recent developments pertaining to the use of drones, and the latest regarding federal government regulation.

Now, Tim, the Federal Aviation Administration has recently adopted formal regulations applicable to Unmanned Aircraft Systems. When do these actually go into effect?

Tim Crawley: Well, thank you John and good morning everyone. Yes, John, on August 29th, Part 107 of the Federal Aviation Regulations becomes effective, which will provide the first clear formal step toward integrating the commercial use of drones, or as the FAA refers to them, Unmanned Aircraft Systems, into the national air space. Again, August 29th.

John: What category or categories of UAS do the new regulations actually apply to?

Tim: John, Part 107 regulations are specifically directed to small, by definition, under 55 pounds including payload, unmanned aircraft systems. We'll call them drones for the purposes of this podcast. Anything above that is still prohibited unless it's a military application.

Also it's important to note that Part 107 specifically applies only to commercial operations, and that is opposed to the two other recognized classifications of drone use, the first of which would be public use, which is governmental functions, including military, police, fire protection, border patrol and customs.

The second "other classification", is hobby or recreational use, and that use is still governed by section 336 of public law 112 95 which will be now be Part 101 of the Federal Aviation Regulations.

John: What will the new pilot qualifications be under the FAA regulations of the UAS?

Tim: This is the most significant change from the pre-existing regime – the Certificate of Authorization, or Section 333 waiver, that the FAA has been granting on a case by case basis previously for commercial drone use.

The new regulation creates a new category of operators, and it's called the "remote pilot in command." The requirement is that operation of a small drone may only be done by holder of a remote pilot airman certificate with a small UAS rating, or it could be done under the supervision directly of such a person.

You actually have to have an individual qualified as a remote pilot in command. To qualify for that certification, a person has to demonstrate aeronautical knowledge by either, number one, passing an aeronautical knowledge test at an FAA approved knowledge testing center. There are about 690 of those centers nationwide, and you can go to the faa.gov website to see where those are.

The second potential way to qualify is that you hold a Part 61 pilot certificate. In other words, you're already a licensed pilot, other than a student pilot. Even if you have that though, you have to have completed a flight review within the previous 24 months, and you have to complete a small UAS online training course which is provided by the FAA.

Part of that is going to be a delay in the August 29th implementation of people actually being able to fly drones, because even if you had a preexisting waiver, and you have a licensed pilot flying your drone, you're still going to have to jump through these additional Part 107 qualification hoops to continue use of that drone.

The other two pieces of that qualification are – whoever the pilot in command is, he has to be approved through the transportation security administration, and he has to be at least 16 years old — which we would hope everyone was that already!

John: What operational restrictions commercially UAS use are contained in the new FAA regulations?

Tim: The operational limits imposed by Part 107 include what is, at present, the most restrictive provision – being visual line of site. In other words, you're not going to have these autonomous drones like we've seen in some TV commercials just zipping around flying over people's backyards, and over their businesses.

Visual line of site requires that the drone remains visible, unaided, meaning not using binoculars, or virtual reality goggles, or anything like that. Unaided visual line of site of the remote pilot in command at all times. That's the most restrictive thing obviously.

There are other restrictions such as the maximum altitude for flight would be 400 feet above ground level, maximum air speed would be 100 miles an hour which sounds awfully fast to me although my ex-wife may have reached that occasionally on the interstate (I don't have personal knowledge of that!)

Other restrictions would be daylight operations only, but with one added proviso that you can operate 30 minutes before sunrise, and up to 30 minutes after sunset provided the drone has anti-collision lighting installed.

You still cannot operate over other persons. You can't operate under a covered structure, you can't operate inside a covered stationary vehicle, and you can't operate the drone from a moving vehicle.

John: Are hobbyist uses also regulated under the new FAA regime?

Tim: They are not, John. As I mentioned previously, hobbyist uses are not addressed at Part 107, and are still subject to section 336 of public law 112 95, what is going to be codified at Part 101 of the Federal Aviation Regulations.

John: What is the current status of litigation over federal preemption of national aerospace issues, interrogation of state and local laws, ordinances and rules?

Tim: This is obviously one of the key burning issues right now. Exactly where is the line between personal private property rights, and where the national airspace starts? The key concepts there are that, historically, the FAA has exercised exclusive jurisdiction over the national air space, and over aircraft.

There are two cases pending presently that are really on the cutting edge of this issue. The first one is the pretty infamous case called the Kentucky "Drone Slayer" case. What that involved is on July 26th, 2015, a home owner used a shotgun to bring down a small drone that he claimed was hovering over his backyard.

Now, some initial state criminal charges filed against the homeowner were dismissed by the State Court Judge, who found the shoot down was justified, and was within the homeowner's property protection rights.

Now, the drone's owner filed suit in Federal Court in January of this year, and he has invoked FAA jurisdiction claiming that anything happening in the national airspace, and involving aircraft, supersedes Kentucky trespass law.

All that goes back to the Air Commerce Act of 1926 which establishes that the United States has complete and exclusive national sovereignty in the air space over this country. Now, exactly what that means is still subject to debate.

The only Supreme Court decision on point was in 1946. It's a long time ago, way before anyone had an idea that drones might be hovering over their backyards. Even in that case, the national airspace was basically said to start at approximately 83 feet above ground level. Depending on where the drone is, is it in the air space, or is it in the property owner's private property?

Now, in the Kentucky case, a motion to dismiss was filed by the drone's lawyer for lack of jurisdiction. That motion is still pending before the Court.

The second case which has gotten an Order at least from a District Judge is pending in Connecticut. That case involved a famous father and son who had published some YouTube videos demonstrating they had fixed – first, a hand gun to one of their drones, and then, a second, longer YouTube video, where they'd attached a flame thrower. Apparently, they roasted their Thanksgiving turkey using this flame thrower drone!

Well, the FAA has asserted jurisdiction to at least investigate those drone uses, and issued subpoenas to the father and son. They resisted the subpoenas, and the FAA filed an enforcement action in Federal Court in Connecticut.

The District Judge in Connecticut on July the 18th entered an Order which does allow the FAA to proceed with enforcement of those subpoenas. In other words, the father and son are going to have to answer questions, but the Court in that case stopped short of holding whether the FAA actually had a right to enforce any kind of fine, or protective order, or restriction on the father and son in their uses of their drones.

Interestingly enough, the Court actually said, "It is plausible to believe the defendants' device falls within the definition of an aircraft for the purposes of federal law." He accordingly allowed the subpoenas to proceed, but the Court went on to say, "No clause in the constitution vests the federal government with a general police power over all of the air, or all objects that leave the ground."

The Court stopped short of actually saying the FAA ultimately will have the ability to fine these people. As the Court actually notes in dicta, "The next generation of drones and similar flying contraptions will continue to challenge and shape the law that governs them."

Bottom line, we don't have a definitive answer at this point, but considering all of the state legislation and local regulations that have been enacted, or at least proposed, over 40 states have considered legislation on this topic.

Are they all going to be preempted by federal law? Is there going to be some dividing line between state and local authority versus federal authority? How low does the national air space go? That's the burning issue, and is waiting to be ultimately decided, probably by the US Supreme Court, which will probably take several more years.

John: Where are we on insurance coverage of commercial drone operations?

Tim: Obviously, anyone considering owning, operating, or even contracting with a vendor to use a drone, needs to take a step back, and consider the risk potential, and appropriate insurance coverage as well as possibly contract indemnifications, and/or additional insured provisions just to protect themselves, and try to minimize that risk.

You have to consider the risk profile includes not only personal injury, but privacy invasion claims, property damage to a third party, possibly business interruption claims as well as property damage to the drone itself – which in the big scheme of things is not going to be the biggest financial risk involved here.

Now, the problem a lot of people are going to have is your typical general liability or homeowner's insurance policy is going to specifically exclude coverage for aircraft. The one litigated case to a conclusion before the National Transportation Safety Board which involved a drone which was the *Huerta versus Pirker* case, and did result in a holding by the NTSB that a drone was an aircraft subject to FAA jurisdiction.

As such, since it's been ruled to be an aircraft, it probably would have no coverage for any claims arising under your standard GL or homeowners policies. People that have that kind of coverage need to go out and get something that is appropriate.

Now, we know ISO has created several endorsement forms as well as several specific exclusionary forms that are applicable to drones. There clearly is product available in the insurance marketplace for this coverage.

People would be well served to use a broker, or agent, who is knowledgeable in this area, and make sure that you have appropriate coverage to address the risks before you take flight.

John: Tim, thanks so much for joining us today.



Tim: Thank you, John. My pleasure.

John: That was Tim Crawley from the law firm Anderson Crawley & Burke in Ridgeland, Mississippi. Special thanks to today's producer, Frank Vowinkel.

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