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UAS Manufacturers: How to Position Yourself for Success

April 9, 2015



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Presenters



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Who is a Commercial Operator Today?

➤ Section 333 Exemption Holder

- ❖ Must Comply with the terms of the Exemption
- ❖ Must employ a certificated pilot
- ❖ Meets Proficiency and Currency Standards
- ❖ Must Comply with the terms of the COA
- ❖ Must issue NOTAMs before flight
- ❖ Subject to oversight by Flight Standards District Office
- ❖ Has an Operations Manual that has been reviewed and found Acceptable by the FAA



Who is the Commercial UAS Operator of the Future

➤ Part 107 Operator

- ❖ Regulations do not refer to them as “Pilots”
- ❖ Proficient in English
- ❖ Must be at least 17 years old
- ❖ Must pass an Initial Aeronautical Knowledge Test
- ❖ Tests administered at FAA-approved Knowledge Test Centers
- ❖ TSA Background Check
- ❖ No Medical Certificate
- ❖ No vision test
- ❖ No requirement to demonstrate flight proficiency
- ❖ Application process expected to take 6-8 weeks



The Hobbyist

- The UAS must be flown "strictly for hobby or recreational use"
- The UAS must be operated in accordance with a community-based set of guidelines
- The UAS must weigh under 55 pounds unless otherwise certified
- The UAS must be operated in a manner that does not interfere with and gives way to other aircraft
- The UAS operator must provide notice to air traffic controllers if it is operated within 5 miles of an airport
- The UAS must be flown within visual line of sight
- No Training, Education or Medical requirements



It's a Small UAS, What Could go Wrong?

- Regulations permit operation of a 55 pound vehicle at speeds of up to 100 miles per hour by a person who does not have to demonstrate any flight proficiency
- Damage or destruction of property
- Injury or death of a person on the ground
- Midair collision with an aircraft causing substantial damage
- Ingestion of UAS into engine causing shutdown
- Ingestion of UAS into engine causing uncontained turbine failure (Sioux City, 1989)



Potential Scenarios

- We are not aware of any current tort suits arising out of UAS accidents, but there have been several accidents and incidents involving UASs in the US and abroad.
 - ❖ Near Collision of US Airways jet and UAS in Florida
 - ❖ St. Louis Drone Crash
 - ❖ UAS Crash into Crowd at Bull Run Event in Virginia
 - ❖ UAS Crash on White House Lawn



Potential Claims and Damages

- Plaintiffs may file a number of claims
 - ❖ Third-Party Personal Injury/Death Claims
 - ❖ Business Interruption
 - ❖ Property Damage
- Compensatory Damages
 - ❖ What does it take to put the injured party back in the position they were in before the accident
 - lost wages,
 - medical expenses,
 - pain and suffering



Punitive Damages


- Extra damages awarded to punish the defendant
- Generally requires some aggravating factor such as misconduct that is:
 - ❖ Willful
 - ❖ Wanton
 - ❖ Grossly Negligent
 - ❖ Without Regard for the Safety of Others
- Most states have limits on Punitive Awards
- Generally not covered by insurance



Core Allegations in any Product Liability Suit

- The core allegations in any product liability suit – something about your product or services is unsafe in its design, manufacture, warning, or training.

- A product is “unsafe” if –
 - ❖ It fails to perform as an ordinary user or consumer would expect using the product in a reasonably foreseeable manner.
 - ❖ The risks associated with the product’s design outweigh the benefits of the design.



Core Allegations in any Product Liability Suit

- If the hazard(s) cannot be reduced or eliminated through the design process, warnings and labels must be used to warn intended users.

- A product can include the overall system and also:
 - ❖ Components and sub-assemblies
 - ❖ Operating software
 - ❖ Training programs
 - ❖ Product literature
 - ❖ Equipment that must be utilized with the product for it to operate safely



Plaintiffs Seek Damages Under Certain Legal Theories

- Plaintiffs seek damages under several broad legal theories –
 - ❖ Strict Liability
 - ❖ Negligence
 - ❖ Failure to Warn
 - ❖ Breach of Warranty



Strict Liability – Liability Without Fault

- A plaintiff must prove that the UAS manufacturer (1) sold a product that was “defective” at the time it left the manufacturer’s hands; (2) the product reached the plaintiff without substantial change; and (3) the defect was the proximate cause of the plaintiff’s injuries.
- Most states have adopted this standard, which focuses on the condition of the product, not the nature of the company’s actions.



Negligence

- A plaintiff needs to show that the UAS manufacturer (1) had a duty to exercise reasonable care in the design/manufacture of the product; (2) breached that duty; and (3) thereby proximately caused the plaintiff's damages.



Failure to Warn

- A UAS manufacturer has a duty to warn its customers of potential dangers about which it knows or should know concerning the use of the product. If this duty is breached, the product is considered defective.
- Most states impose a continuing duty to warn of hazards about which the company discovers or should have discovered following the sale of the product.
- No duty to warn of open or obvious hazards



Breach of Warranty

- A plaintiff needs to show the existence of warranty and breach.
 - ❖ May be based on express statements from the manufacturer
 - ❖ Implied warranty of merchantability – law implies warranty that product will not harm consumers who use it for ordinary purposes
 - ❖ Implied Warranty of Fitness for a Particular Use



Promotional Materials

- Sales Materials can give rise to Express Warranties
- Any "affirmation of fact or promise relating to the goods which becomes the basis of the bargain" creates an express warranty.
- In some states, a product can be considered defective if it did not conform to the representations made to the purchaser
- Statements that are "puffery," i.e. opinion, do not create a warranty



Liability for Civil Penalty Violations

- Operators can face civil penalty actions of fines amounting to \$10,000 or more per flight
- Failure to include technology could invite suits for indemnity from operators who receive a civil penalty
- Failure to keep flight restrictions up to date in Geo-Fencing system
- Allowing the aircraft to exceed 400' AGL



Liability Issues from Documentation and Manuals

- Aircraft manuals can be a major source of liability.
- The Aircraft manual can be considered a “product.”
- A manufacturer can be strictly liable if the Manual is considered defective.
- Failure to Warn or Inadequate Warning
- Inadvertent express warranty given by inexact use of wording in a manual



Common Law Indemnity

- The law can imply an obligation to indemnify under certain circumstances
- The duty usually arises where two parties are liable for an injury but one of the two's liability is without fault
- Can be used by sellers in the chain of distribution to get compensation from a manufacturer when a defective product is sold

A Balanced Plan of Product Liability Prevention

➤ Immunities

❖ Contract Specification Defense

- Protects a manufacturer from being held liable for injuries caused by design defects in products manufactured in accordance with directions and specifications supplied by the purchaser, unless the danger associated with following the specifications is obvious. See *Herrod v. Metal Powder Prods.*, 886 F. Supp. 2d 1271, 1274 (D. Utah 2012).
- Application of the Defense
 - In Strict Liability Situations
 - Example: Modification of UAS to add additional propeller



A Balanced Plan of Product Liability Prevention

➤ Immunities

❖ Component Parts Defense

- A component manufacturer who simply designs a component to its buyer's specifications and does not substantially participate in the integration of the component into the design of the product is not liable. See Restatement (Third) of Torts: Products Liability § 5.



A Balanced Plan of Product Liability Prevention

➤ Indemnities

- ❖ Negotiate substantial indemnities and ensure customers can satisfy such indemnities
- ❖ Special indemnities for component manufacturers

➤ Other Limitations on Liability

- ❖ Limit liability or shift to vendor or customer using terms and conditions
 - Example: Build in Contract Specification Defense into terms and conditions (e.g., on-site customer review and approval)



A Balanced Plan of Product Liability Prevention

➤ Insurance

- ❖ Need for insurance is significant
- ❖ Types of insurance – aviation safety, privacy, and cybersecurity
- ❖ Inquire with current insurer whether coverage can be added as part of existing policy
- ❖ Component Manufacturer as Additional Insured
- ❖ Ensure coverage includes defense costs



Establishing State-of-the Art and Best Practices

- Demonstrate compliance with all government and industry standards, and go above and beyond such standards.
 - ❖ Compliance will not eliminate tort exposure, but will demonstrate that a UAS manufacturer or operator was acting reasonably.
- Cost/Benefit Analysis
 - ❖ Consider product liability implications in incorporating new technologies. If state-of-the-art technologies are not incorporated, plaintiffs likely will use it against a manufacturer in potential product liability lawsuit.
 - ❖ Examples: Anti-Collision systems, Geo-Fencing



Government Design Standards - Airworthiness Certificate

- Obtaining a type certificate for a newly designed manned aircraft takes 3-5 years
- No requirements for any small UAS to have an airworthiness certificate
- The only requirement is that the operator be sure the vehicle is in a safe condition for flight
- No specific technology mandates such as geo-fencing and return to home if there is a loss of positive control



Registration and Marking

- All small UAS flown commercially have to be registered
- Any foreign entity that cannot register an aircraft in the US can't fly under these rules
- All small UAS flown commercially have to display their registration number
- No requirement for manufacturer-supplied fireproof identification plate



Dealing with Warranty Issues

- Implied Warranties can be Disclaimed:
 - ❖ **Manufacturer's Express Warranty is the sole warranty**
 - ❖ All other warranties, either express or implied are waived
 - ❖ The Express Warranty supersedes any other remedy, whether in contract, tort, or strict liability
 - ❖ The purchaser's remedies are limited to the manufacturer's choice of refund, repair or replacement on an exchange basis and exclude liability for incidental, special, consequential or any other damages.
 - ❖ Manufacturer is not liable for any incidental or consequential damages.



Express Warranties can be Limited

- Example of an Express Warranty in an aviation context:
 - ❖ Manufacturer, warrants every non-certified aircraft engine, sold as new and delivered by an authorized distributor/reseller, to be free from defects in material and workmanship for a period of 12 months from the date of shipment.



Example of a Limitation on Express Warranties Through the Claims Process

- ❖ Written notice of any warranty claim must be submitted to Manufacturer within fifteen (15) days of a suspected defect in material or workmanship and the engine, accessory or part must be made available for inspection within thirty (30) days after the claim has been made.
- ❖ To evaluate a claim, following items must also be made available:
 - invoice delivered to the customer as proof of date of purchase/delivery,
 - log book or other documentation showing all maintenance performed,
 - signed and dated inspection/maintenance sheets.
- ❖ Manufacturer reserves the right not to accept any claim not submitted in accordance with these requirements.



Contact Information

If you have any questions or need assistance with any issues related to UAS, please contact us:

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