The Aircraft Exclusion

How the "Model or Hobby Aircraft" Exception Affects Insurance Coverage for Unmanned Aircraft

By Matthew G. Berard

"Landing" on good definitions can make all the difference in the world.

A new claim is on your desk. You become familiar with the facts and discover that the insured under a homeowners policy is being sued because the insured's drone caused bodily injury when it fell from the sky. Naturally, your first thought is whether the homeowners policy covers this claim. You read the insurance policy line by line to determine if there is coverage. Then, you reach the aircraft exclusion and conclude that it should apply to bar coverage for losses arising out of the operation, maintenance or use of drones because drones are "aircraft." However, depending on the language of the policy, a coverage determination may need far more analysis.

The prevalence of Unmanned Aircraft Systems (UAS) today, commonly referred to as drones, increases the likelihood that the aircraft exclusion in a homeowners insurance policy will become more relevant than ever before. Undoubtedly, there are many beneficial uses for UAS. However, apart from commercial uses, many individuals operate UAS simply for recreation. It is commonplace for such individuals to attach a camera to their freshly unboxed UAS and take to the skies. The problem, however, is that often these UAS operators are inexperienced, unfamiliar with Federal Aviation Administration (FAA) regulations and airspace, and do not take proper care to ensure that the aircraft functions properly. Instances of such failures are evident from a simple YouTube search, such as

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"drone fail" or "drone crash," which will yield numerous results of videos of UAS mishaps. Those who operate UAS that malfunction, run out of battery life, or encounter icing or strong winds at high altitude may cause property damage or serious bodily injury to unsuspecting individuals on the ground below.

You and your clients should anticipate that individuals who sustain bodily injury or property damage caused by a UAS will turn to an operator's homeowners insurance for coverage. It is also possible that a claimant may seek coverage under a commercial general liability (CGL) policy if a UAS was operated by or on behalf of a business. Thus, it is necessary to determine which coverage obligations an insurer owes when a claim is tendered after a UAS causes bodily injury or property damage. This article will take this insurance coverage analysis step by step, point out issues that will be encountered and potentially raised by plaintiffs' lawyers, highlight the critical information to obtain during the claims-handling process before making a coverage determination, and present recommendations to attorneys counseling insurers and insurers regarding this emerging area of insurance and aviation law.

The Aircraft Exclusion

Those familiar with homeowners insurance policies are aware of the terms commonly found in insuring agreements, exclusions, exceptions, and conditions. Generally, the aircraft exclusion precludes coverage for "bodily injury or property damage arising out of the operation, maintenance, use, loading or unloading of… an aircraft." Homeowners Policy, Form FP-7955. Aircraft exclusions may also preclude coverage for "bodily injury or property damage arising out of the ownership, maintenance, occupancy, operation, use, or unloading or unloading of an aircraft owned or operated by or rented or loaned to you," Homeowners Policy, Form MPL 8180-000; and "bodily injury or property damage arising out of (1) the operation, maintenance, use, loading or unloading of an aircraft; the entrustment by an "insured" of an aircraft to any person; or (3) vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using an aircraft," Homeowners Policy, Form FMHO 943 (ed. 11-96) ISO 1990). Similarly, CGL policies preclude coverage for "'bodily injury' or 'property damage' arising out of the ownership, maintenance, use or entrustment to others of any aircraft… owned or operated by or rented or loaned to any insured.'" CGL Policy, ISO Form CG 00 01 10 01- 2000.

At first glance, these aircraft exclusions appear to be relatively straightforward and would appear to preclude coverage for UAS-related accidents. After all, UAS is the acronym for Unmanned *Aircraft* Systems. However, bear in mind that an insurer bears the burden to establish the applicability of an exclusion. *See generally Hollywood Flying Serv., Inc. v. Compass Ins. Co.*, 597 F.2d 507 (5th Cir. 1979).

Notably, some homeowners policies define "aircraft," whereas other policies might not, as "any contrivance used or designed for flight, except model aircraft or hobby aircraft not used or designed to carry people or cargo." Homeowners Policy, Form FMHO 943 (ed. 11-96) (ISO 1990). *See also Hanover Ins. Co. v. Showalter*, 204 Ill. App. 3d 263, 561 N.E.2d 1230 (Ill. Ct. App. 1990) (defining "aircraft" in the policy as "any contrivance used or designed for flight except model aircraft of the hobby variety not used or designed to carry people or cargo.").

The first part of the definition of "aircraft" as stated above is "any contriv-

ance designed or used for flight." This language mirrors the definitions found in many states' aeronautics codes and is broader than the dictionary definition. *See* Merriam-Webster's Dictionary (Ninth Edition) (defining "aircraft" as "a machine (such as an airplane or a helicopter) that flies through the air."). If an analysis stopped here, a drone would qualify as an "aircraft" because it is a "contrivance used or designed for flight." However, this aircraft exclusion provides an exception for "model aircraft or hobby aircraft not used or designed to carry people or cargo." Homeowners Policy, Form FMHO 943 (ed. 11-96) (ISO 1990). *See also St. Paul Guardian Ins. Co. v. Old Republic Ins. Co.*, No. CIV. 92-1045-FR, 1993 WL 112468 (D. Or. Apr. 5, 1993) *aff'd*, 47 F.3d 1176 (9th Cir. 1995) (excluding coverage for "liability resulting from aircraft accidents, commercial or noncommercial. But we do cover model aircraft incapable of carrying passengers or property.").

While an insurer has the burden to establish whether an aircraft exclusion precludes coverage, the burden of proof shifts to an insured to demonstrate that the "model or hobby aircraft" exception applies to *restore* coverage.

Because the homeowners policy does not define the terms "model aircraft" and "hobby aircraft," the next question in a coverage analysis is what makes an aircraft a "model" or a "hobby" aircraft? To answer that question, the exception must be dissected into two inquiries. First, are drones "model" or "hobby" aircraft? Second, are drones used or designed to carry people or cargo?

The Model or Hobby Aircraft Exception

Determining whether a drone is a "model" or a "hobby" aircraft is critical to a coverage analysis. While an insurer has the burden to establish whether an aircraft exclusion precludes coverage, the burden of proof shifts to an insured to demonstrate that the "model or hobby aircraft" exception applies to *restore* coverage. *See generally Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co.*, 868 F. Supp. 1278 (D. Utah 1994), *aff'd*, 52 F.3d 1522 (10th Cir. 1995).

Neither "model" nor "hobby" is defined in today's homeowners policies. When an insurance policy does not define a term, courts look to the plain and ordinary meaning, generally by referring to the dictionary definition. *See, e.g., State Farm Fire & Cas. Co. v. Ham & Rye, L.L.C.*, 142 Wash. App. 6, 174 P.3d 1175 (Div. 2 2007) ("If an insurance policy leaves a term undefined, courts give to the term its plain, ordinary, and popular meaning; [and] may use a standard English dictionary definition as an aid."); *Design Professionals Ins. Co. v. Chicago Ins. Co.*, 454 F.3d 906 (8th Cir. 2006)("If an insurance policy does not define a word, [ ] courts may look to a standard English-language dictionary to determine its common meaning."); *Lyons v. Allstate Ins. Co.*, 2014 WL 494873 (N.D. Ga. 2014)(same).

Before consulting a dictionary, ask yourself, what do you see when you think of a "model" or a "hobby" aircraft? One might argue that "model" or "hobby" aircraft are commonly perceived to be small-scale, replica airplanes that a pilot might purchase at a hobby shop, assemble, and fly over open fields. But does the word "model" refer to the physical characteristics of an aircraft or to something else? Further, does the term "hobby" mean that it is a "hobby" to build the aircraft or a "hobby" to fly it?

Because there is no case law that governs the definition of "model aircraft" or "hobby aircraft," a plain and ordinary meaning of those terms may be used. Merriam-Webster's Dictionary defines the noun "model" as "(1) a usually small copy of something; (2) a particular type or version of a product [such as a car or computer]; (3) a set of ideas and numbers that describe the past, present, or future state of something [such as an economy or a business]." The verb "model" means "(1) to design [something] so that it is similar to something else; (2) to make a small copy of [something]; (3) to create a model of [something]; (4) to make something by forming or shaping clay or some other material." *Id.*

"Hobby" is defined in Merriam-Webster's Dictionary as "a pursuit outside one's regular occupation engaged in especially for relaxation." *Id.* The Texas Court of Appeals similarly defined "hobby" as "a specialized pursuit… that is outside one's regular occupation and that one finds particularly interesting and enjoys doing usu[ally] in a nonprofessional way as a source of leisure-time relaxation; … any favorite pursuit or interest." *Moore v. Tarrant Appraisal Dist.*, 823 S.W.2d 418, 419 (Tex. App. 1992), *writ granted* (Sept. 16, 1992), *rev'd on other grounds*, 845 S.W.2d 820 (Tex. 1993). Yet these definitions fail to answer whether it is a "hobby" to build or a "hobby" to fly the aircraft referred to in a homeowners policy. Consequently, we still do not know whether a "hobby aircraft" is a particular class of aircraft or simply any aircraft, regardless of size, flown for hobby.

A plaintiff's lawyer may assert that there is more than one reasonable interpretation of the word "hobby" and an ambiguity exists that should be construed in favor of an insured. A plaintiff's lawyer will attempt to argue that drones are flown for hobby and are, thus, "hobby aircraft," which means that the "model or hobby aircraft" exception applies to restore coverage. However, this interpretation is probably too broad because it could lead to an absurd result not reasonably expected by an insured or contemplated by a policy. For instance, this interpretation would make a private jet a "hobby aircraft" simply because a pilot flies it as a hobby. Additionally, the use of the word "model" with "hobby" in the exception to the aircraft exclusion strongly suggests that these words were intended to refer to small-scale, replica aircraft.

Although courts have not yet ruled on this issue, the dictionary definitions appear to be consistent with what are commonly perceived as "model" or "hobby" aircraft. Thus, an insurer would generally advance its position by relying solely on these definitions to argue that the plain and ordinary meaning of "model or hobby aircraft"

does not encompass a drone (quad-copter) because it is not a "small copy of something" or "similar to something else."

One potential counterargument that a plaintiff's lawyer could make is that the insurance policy does not limit the terms "model aircraft" and "hobby aircraft" strictly to fixed-wing airplanes. A plaintiff's lawyer may insist that "model *aircraft*" includes model helicopters as well as model airplanes, and the plaintiff's lawyer would be correct. Tellingly, the use of the word "aircraft," rather than "airplane," in the aircraft exclusion was a deliberate drafting choice to include, among others, full-size airplanes *and* helicopters.

In the event that a court uses the definition of "model aircraft" in the FMRA, an insurer has one last opportunity to deny coverage properly: an insurer can deny coverage if it has information that an unmanned aircraft was not in the visual line of sight of its operator.

Notably, the aircraft exclusion has been applied to aircraft other than airplanes. *See Metro. Prop. & Cas. Ins. Co. v. Gilson*, 458 F. App'x 609 (9th Cir. 2011) (applying New Hampshire law to hold that an ultralight vehicle was an "aircraft" under aircraft exclusion in the insurance policy and that "[a] reasonable insured would interpret the term according to its everyday usage, and a motorized vehicle that flies through the air for hundreds of miles under the control of one or more pilots easily falls within the everyday definition of an "aircraft."); *Farmers Ins. Co. v. Daniel*, No. CIV-07-1421-C, 2008 WL 4372879 (W.D. Okla. Sept. 19, 2008)(holding that the aircraft exclusion in a homeowners policy clearly and unambiguously applied to preclude coverage for deaths and injuries sustained in a helicopter crash where the homeowner hired a pilot to provide sight-seeing tours to party guests at an Elks Lodge in Oklahoma.); *Hanover Ins. Co. v. Showalter*, 204 Ill. App. 3d 263, 149 Ill. Dec. 534, 561 N.E.2d 1230 (Ill. Ct. App. 1990) (noting that Webster's Third New International Dictionary 1635 (1981) defines "aircraft" as "a weight-carrying machine or structure for flight in or navigation of the air that is designed to be supported by the air either by the buoyancy of the structure or by the dynamic action of the air against its surfaces—used of airplanes, balloons, helicopters, kites, kite balloons, orthopters, and gliders but chiefly of airplanes or aerostats"); *Totten v. New York Life Ins. Co.*, 298 Or. 765, 696 P.2d 1082 (Or. 1985) (determining that the clause in the insurance policy did not merely exclude "aircraft" from coverage, but excluded "any aircraft," and therefore the court used the ordinary dictionary definition of "aircraft" to exclude coverage for a hang-gliding accident.); *Tucker v. Allstate Texas Lloyds Ins. Co.*, 180 S.W.3d 880 (Tex. App. 2005)(reasoning that determining if a homeowners' insurance policy exclusion applied to liability coverage for injury arising out of use of aircraft depended on whether (1) the accident arose out of the inherent nature of the aircraft; (2) the accident occurred within the natural territorial limits of the aircraft; (3) the aircraft merely contributed to the condition that produced the injury or the aircraft itself produced the injury; and (4) insured had intended to use the plane as a plane.). *But see Hanover Ins. Co. v. Showalter*, 204 Ill. App. 3d 263, 561 N.E.2d 1230 (Ill. Ct. App. 1990)("In construing the language of the exclusionary provision, we judge that a parachute is not an 'aircraft,' that is, a 'contrivance used or designed for flight…"); *N. Mut. Ins. Co. v. Hammar*, 191642, 1996 WL 33348777 (Mich. Ct. App. Nov. 12, 1996) (holding that the aircraft exclusion did not apply to a skydiving accident because bodily injury did not "arise out of" operation maintenance, operation or use of an aircraft," but rather, injuries were sustained when one skydiver landed on another during a parachute jump exhibition.).

A plaintiff's lawyer may argue that a "model *aircraft*" or a "hobby *aircraft*" would encompass a "model" or a "hobby" helicopter. With the exception of fixed-wing military or law enforcement drones, we commonly perceive UAS as quad-copters, that is, rotor-wing aircraft that are able to take off and land vertically. A plaintiff's lawyer would then likely argue that there is no significant difference between, for instance, a small-scale replica of a Blackhawk helicopter and a rotor-wing UAS that would justify excluding coverage for one but insuring the other, especially because both have similar flight capabilities. However, the dictionary definition of "model" ("usually small copy of something") might ultimately save an insurer because a drone is not a small copy or a replica of a larger aircraft.

In the event that an insurer issued a homeowners policy without the exception for "model" or "hobby" aircraft, the insurer would likely prevail. If an insurer is confronted with a claim under a homeowners policy that includes an exception for "model" or "hobby" aircraft, a plaintiff might concede that a drone is an "aircraft" and thus the aircraft exclusion applies. But a plaintiff's lawyer would likely focus on the argument that a drone constitutes a "model" or a "hobby" aircraft to attempt to trigger the exception to the aircraft exclusion.

A plaintiff's lawyer may cite the definitions contained in the FAA Modernization and Reform Act of 2012, P.L. 112-95, Feb. 14, 2012, Title III, Subtitle B, Sec. 331, *et seq.* (FMRA). The FMRA provides that "[t]he term 'unmanned aircraft' means an *aircraft* that is operated without the possibility of direct human intervention from within or on the aircraft." *Id.* Additionally, "[t]he term 'unmanned aircraft system' means an unmanned aircraft and associated elements (including communication links and the components that control the unmanned aircraft) that are required for the pilot in command to operate safely and efficiently in the national airspace system." *Id.* The FMRA defines "model aircraft" as "an *unmanned aircraft* that is (1) capable of sustained flight in the atmosphere; (2) flown within visual line of sight of the

person operating the aircraft; and (3) flown for hobby or recreational purposes." *Id.* at Sec. 336 (emphasis added).

Notably, the FMRA does not mention what we might typically envision when we think of a "model" or a "hobby" aircraft—a small-scale replica of an actual airplane that someone might purchase at a hobby shop and assemble. A plaintiff's lawyer probably could not make a credible argument that a UAS is an "aircraft" in the general sense. Thus, most plaintiffs' lawyers will have an incentive to rely on the definition in the FMRA, and they might successfully argue that an unmanned aircraft flown for recreation falls within the exception to the aircraft exclusion. At the very least, a plaintiff's lawyer may encourage a court to find an ambiguity in the policy language that should be construed against an insurer.

The FMRA does not characterize a "model aircraft" in terms of its physical characteristics or size. As indicated by the quotes from the FMRA above, analyzing whether to characterize something as a "model aircraft" requires a determination of whether an unmanned aircraft is "flown for hobby or recreational purposes." Based on this definition, there might appear to be plenty of confusion regarding the term "model aircraft," and a court may find that there is ambiguity in the definitions provided in the language of the policy itself, the state aeronautics codes, the dictionary, *and* the FMRA when lawyers cite them. A plaintiff's lawyer will likely argue that the definition of "model aircraft" is ambiguous because it has more than one meaning, especially in light of the definition in the FMRA. A plaintiff's lawyer might also point out that the FAA website refers to UAS as "model aircraft" in the FAA regulations and recommendations for safe operation. However, should a court rely on the FAA's referral to UAS as "model aircraft" when the drafter of an insurance policy may not have contemplated such a broad definition in the coverage context? Insurers' lawyers could argue that a governmental agency's technical definition of, or the references found in other regulations to, the same words should have no effect on the plain and ordinary meaning of those terms or interpreting the intent of a policy drafter.

For instance, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's rejection of an attempt to create ambiguity in an insurance policy by referencing regulations and publications, rather than the natural and ordinary understanding of the term "aircraft." *Metro. Prop. & Cas. Ins. Co. v. Gilson*, 458 F. App'x 609 (9th Cir. 2011). The insured's estate argued that the Federal Aviation Regulations (FARs) distinguished an ultralight vehicle from an "aircraft" because the FARs "limit[ ] the operation of 'ultralight vehicles' near 'aircraft.'" *See* Defendant Pauline Gilson's Opposition to Metropolitan's Motion for Summary Judgment at 12-13, *Metro. Prop. & Cas. Ins. Co. v. Gilson*, No. 2:09-cv-01874-PHX-GMS (D. Ariz. July, 7 2010), 2010 WL 2068218 (citing 14 C.F.R. §103.13). Further, the insured argued that "*ultralight vehicles* need not even meet the elementary airworthiness standards specified for '*aircraft*.'" *Id.* (citing 14 C.F.R. §103.7)("ultralight vehicles and their component parts and equipment are not required to meet the airworthiness certification standards specified for aircraft or to have certificates of airworthiness."). The district court held that the ultralight vehicle was an "aircraft" and found that "[w]hether or not the insurance term ['aircraft'] is ambiguous, no New Hampshire decision relies on technical publications to guide its definition of a term in an insurance policy. Rather, the courts look to the 'natural and ordinary meaning,' not to technical classifications." *Id.* (citing *Nicolaou v. Vermont Mut. Ins. Co.*, 155 N.H. 724, 728, 931 A.2d 1265, 1268 (2007)).

If a plaintiff's lawyer relies on the FMRA, there is authority for the proposition that referencing anything other than the plain and ordinary meaning of a term to create an ambiguity is improper. *See generally Gilson*, 458 F. App'x 609 (9th Cir. 2011). *See also Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wash. 2d 869, 784 P.2d 507 (1990) ("The language of insurance policies is to be interpreted in accordance with the way it would be understood by the average man, rather than in a technical sense."); *Farmland Indus., Inc. v. Republic Ins. Co.*, 941 S.W.2d 505 (Mo. 1997)("When interpreting the language of an insurance policy, this Court gives a term its ordinary meaning [that is, one that the average layperson would reasonably understand], unless it plainly appears that a technical meaning was intended."); *Allstate Ins. Co. v. Runyon Chatterton*, 135 N.C. App. 92, 518 S.E.2d 814 (N.C. Ct. App. 1999)("Non-technical words are to be given their meaning in ordinary speech unless it is clear that the parties intended the words to have a specific technical meaning… [u]se of the ordinary meaning of a term is the preferred construction, and in construing the ordinary meaning of a disputed term, it is appropriate to consult a standard dictionary."). *But see Valley Forge Ins. Co. v. Field*, 670 F.3d 93 (1st Cir. 2012)("Words in an agreement are given their ordinary and usual sense 'unless it appears that [the words] are to be given a peculiar or technical meaning'… [a]nd insurance policy language is interpreted based on both the common and the technical understanding of the words.").

Following the logic in *Am. States Ins. Co.*, and as implied in the dictionary definition, a camera would not likely qualify as "cargo" when a drone with an attached camera takes pictures or video, then returns to its originating location.

A court might be reluctant to use a definition of a term that would depend on deciphering the intended use of the item to which the term refers. Nonetheless, if a court relies on the FMRA, there may be one other saving grace for insurers. In addition to being flown for hobby or recreation, an unmanned aircraft must be in the visual line of sight of the person operating the aircraft for it to constitute a

"model aircraft." *See* FMRA §336(c)(2). In the event that a court uses the definition of "model aircraft" in the FMRA, an insurer has one last opportunity to deny coverage properly: an insurer can deny coverage if it has information that an unmanned aircraft was not in the visual line of sight of its operator. Thus, if an operator did not keep the unmanned aircraft in sight, an insurer's lawyer may succeed in arguing that the unmanned aircraft does not qualify as a "model aircraft" according to the definition in the FMRA.

If an aircraft exclusion does not contain the exception for "model" or "hobby" aircraft, it may be appropriate for an insurer to deny coverage.

A court may ultimately determine that the FMRA provides a technical definition and that the plain and ordinary meaning of "model" or "hobby" aircraft does not hinge on the intent of the flight. Rather, a court may rule in an insurer's favor and find that a small-scale replica plane or helicopter is a "model aircraft" in the traditional sense according to the dictionary. However, because the FMRA premised classifying what constitutes a "model aircraft" on the intent of the flight, we can expect a plaintiff's lawyer to argue that the definitions in the FMRA create an ambiguity in the policy language.

"Designed to Carry People or Cargo"

The exception to the aircraft exclusion applies to model or hobby aircraft *not used or designed to carry persons or cargo*. Thus, if a model or a hobby aircraft is "designed," and perhaps to a lesser extent "used," to carry persons or cargo, the exception does not apply to restore coverage. An argument might be made that UAS are *designed* to carry "cargo." For instance, cameras are commonly attached to UAS, and Amazon.com has announced that it is experimenting with delivering merchandise to its customers using UAS. Thus, if it can be successfully argued that a camera or a single package is "cargo," and the specific UAS involved in a claim was used or designed to carry it, then coverage may be denied. To resolve this part of a coverage analysis, it is necessary to determine what constitutes "cargo."

In *Baker v. Catlin Specialty Ins. Co.*, 769 F. Supp. 2d 1157 (N.D. Iowa 2011), the court addressed whether a 1979 Chevrolet pickup truck with an auxiliary fuel tank was "mobile equipment" under a commercial general liability policy. The Chevrolet was used to transport fuel for other construction equipment at a salvage site. The CGL policy at issue defined "mobile equipment" in part as "[v]ehicles not described… above maintained primarily for purposes other than the transportation of persons or cargo." *Id.* at 1164. Pertinent to the drone analysis, the court noted that "cargo" is defined by Merriam–Webster's Dictionary as "the goods or merchandise conveyed in a ship, airplane, or vehicle." *Id.* at 1171. The court held that the fuel in the auxiliary tank was "cargo," and thus the Chevrolet failed to meet the definition of "mobile equipment." *Id.*

In *Am. States Ins. Co. v. Travelers Prop. Cas. Co. of Am.*, 223 Cal. App. 4th 495, 167 Cal. Rptr. 3d 288 (2014), *reh'g denied* (Feb. 24, 2014), *review denied* (Apr. 23, 2014), the court addressed whether a food truck satisfied the definition of "mobile equipment," which included vehicles "maintained primarily for purposes other than the transportation of persons or cargo." *Id.* at 296. The court held that "the primary purpose of the… food truck was to serve as a mobile kitchen and not to *transport* persons or cargo." *Id.* (citing *Employers Mutual Casualty Company v. Bonilla*, 613 F.3d 512, 518 (5th Cir. 2010)("The 'inherent purpose' of a mobile catering truck certainly could be seen as including the use and maintenance of its kitchen facilities…").

Following the logic in *Am. States Ins. Co.*, and as implied in the dictionary definition, a camera would not likely qualify as "cargo" when a drone with an attached camera takes pictures or video, then returns to its originating location. Conversely, if a person delivers a package to a neighbor for noncommercial purposes, the package might be considered "cargo." *See State v. Hager*, No. 70947-0-I, 2015 WL 890989 (Wash. Ct. App. Mar. 2, 2015) (citing Webster's Third New International Dictionary 339 (1993) for its definition of "cargo" as "the lading or freight of a ship, airplane, or vehicle: the goods, merchandise, or whatever is *conveyed*."); *Nationwide Agribusiness Ins. Co. v. Byler*, No. CIV.A. 06-1604, 2009 WL 890114 (E.D. Pa. Mar. 31, 2009) (defining cargo as "the goods or merchandise *conveyed* in a ship, airplane, or vehicle; freight."); Black's Law Dictionary 226 (8th Ed. 2004) (defining "cargo" to mean "goods *transported* by a vessel, airplane, or vehicle.")(emphasis added). Note, however, that courts have recognized the commercial nature of the term "cargo." *State Farm Fire and Cas. Co. v. Pinson*, 984 F.2d 610, 613 (4th Cir.1993) (stating that "[c]learly, the term cargo has a strong commercial connotation" and concluding that a boat being towed by a car is not "cargo"). *See also* Compact Oxford English Dictionary, 3rd Ed. (2005) ("goods *carried commercially* on a ship, aircraft, or truck.").

When an item is designed to carry "cargo," it implies that the item, in this case, a drone, must be capable of delivering or commercially conveying those goods or cargo. If a camera is attached to a drone, the drone pilot generally did not intend to deliver it as much as to use the camera for taking pictures or video. While courts have yet to address specifically whether an item that a UAS is *capable* of lifting would be considered "cargo" that the UAS was *designed* to carry, a court would probably find that the plain and ordinary meaning of "cargo" does not include a camera attached to a drone. Thus, it seems unlikely that the exception for "model or hobby aircraft not designed to carry persons or cargo" can be avoided solely on this basis.

However, if all else fails and a court accepts a plaintiff's lawyer's argument that the FMRA should supply the definition of "model or hobby aircraft," an insurer's lawyer should be prepared to advocate that the court should then also use the definition of "cargo" found in Federal Aviation Act. 49 U.S.C.A. §40101, *et seq.* Under the Federal Aviation Act, which the FMRA partially amended, "'cargo' means property, mail,

or both." 49 U.S.C.A. §40102(12). An insurer's lawyer could argue that a drone carrying a camera was used to carry "property," even using technical definitions. This argument should be a last resort because insurers will need to be consistent in seeking the plain and ordinary interpretations of "model" and "hobby" for "model or hobby aircraft," rather than relying on technical definitions, for use in a coverage analysis. Again, in the worst case scenario, when a court agrees with a plaintiff's lawyer that the FMRA definitions govern a coverage analysis, this avenue is available to argue that the model or hobby aircraft exception does not apply.

Questions to Ask an Insured When an Insured Makes a Claim Involving a UAS

If you are an insurer and you receive a claim involving an unmanned aircraft, or if you counsel insurers, there is specific information that you will need to determine whether coverage exists under a homeowners policy containing a "model or hobby aircraft" exception. If an aircraft exclusion does not contain the exception for "model" or "hobby" aircraft, it may be appropriate for an insurer to deny coverage. However, if a policy contains the exception, an insurer should ask certain general and certain specific questions.

General Questions

If a policy contains the exception, an insurer should ask these general questions.

- Does the insured own the aircraft?
- When did the insured purchase the aircraft?
- Where did the insured purchase the aircraft?
- Who piloted the aircraft when the event leading to the claim took place?
- How much experience does the pilot have flying this aircraft?
- Is the pilot FAA certified to fly UAS? Does the pilot have an FAA license or licenses of any kind?
- What is the make and model of the UAS? What does it look like? If the UAS at issue is what someone traditionally would perceive to be a drone (*i.e.*, a quad-copter), then it likely does not fit the plain and ordinary meaning of "model" or "hobby" aircraft.
- What were the weather conditions, and did the pilot fly the aircraft into the clouds? If yes, the drone might not satisfy the definition of "model aircraft" in the FMRA if it was not in the pilot's visual line of sight.

Specific Questions

If a policy contains the exception, an insurer should ask these specific questions.

- Why was the pilot operating the aircraft, or more precisely, what was the intent or purpose of the flight? If the intent was for anything other than hobby or recreation, the UAS does not satisfy the definition of "model aircraft" in the FMRA, and the claimant would lose the ability to rely on this definition to argue there is coverage under the homeowners policy.
- Was the operation of the aircraft for compensation or for a commercial purpose? If so, the UAS not only fails to satisfy the definition of "model aircraft" under the FMRA, but the insurer can also rely on the business-pursuits exclusion as a fallback to preclude coverage.
- Was the aircraft carrying anything such as a camera or a package? Courts have not resolved whether either one constitute "cargo"; however, if a court determines that whatever was transported with the drone is "cargo," then the business-pursuits exclusion should apply because "cargo" is a commercial term.
- Where was the pilot physically located while operating the aircraft?
- Where did the aircraft crash in relation to that position?
- Where did the pilot last observe the UAS?
- Was the pilot flying the unmanned aircraft strictly with reference to a video feed from a camera attached to the aircraft? If so, this would further bolsters the insurer's position because the UAS might not satisfy the definition of "model aircraft" under the FMRA if it was not in the pilot's visual line of sight.
- Were there buildings or any other obstructions between the aircraft and the pilot? If so, this also would bolster the insurer's position further, again because the UAS might not satisfy the definition of "model aircraft" under the FMRA if it was not in the pilot's visual line of sight.
- Did the UAS crash while it was not in the pilot's visual line of sight?
- Did the UAS crash because it was not in the pilot's visual line of sight?

Recommendations

It is important that an insurer review its policy language and consider the effect of the "model or hobby aircraft" exception. Now that UAS are becoming inexpensive and increasingly popular, the potential for an occurrence involving an aircraft has increased exponentially, and the aircraft exclusion may be relevant in far more claims than initially envisioned when the language was drafted.

Accordingly, the language in a policy should take into account a plaintiff's potential arguments about whether the aircraft exclusion applies to a UAS. An insurer could simply issue a homeowners policy without a definition of "aircraft" or without the "model or hobby aircraft" exception. Alternatively, an insurer could eliminate the definition of "aircraft," including the "model or hobby aircraft" exception, entirely by endorsement. However, if an insurer still wishes to provide coverage for traditional model or hobby aircraft pilots, it could redefine the term "aircraft" in its policy, by endorsement, to provide an exception for small-scale, replica model or hobby aircraft only. When "landing" on a new definition, it is important not to use the FMRA as guidance on what constitutes a "model" or a "hobby" aircraft. Any similarities between the policy language and the FMRA definitions may compromise an insurer's argument seeking a plain and ordinary meaning of those terms in future litigation.

While some policies have contemplated the use of model and hobby aircraft, UAS previously were less commonly used compared to current UAS operations. Insurers today encounter inexpensive, mass-produced flying machines operated by inexperienced pilots who have little knowledge of applicable federal law and regulations than in the past, and it is a certainty that claims for bodily injury and property damage arising out of the use of UAS will increase in the years to come. The uncertainty, however, is how a court will address such claims.