Time to Lawyer Up! What Florida's New Drone Law Means for You
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Florida's original drone law blocked most state agencies from flying sUAS for any purpose, even basic research.

That was an unintended result.

Nobody "had it out for" the commercial drone industry in 2013. The consequences of the 2013 law came from a lack of awareness about how drone technology can change the world.

The new law signed by the Governor on May 14 is quite different. Its provisions directly impact commercial operations. Its full consequences are unclear at the moment. We can only begin to guess what they might be.

One thing is clear. The new law is going to create a lot of lawsuits. Why? Simple: it creates a new way for people to sue drone operators and gives the "prevailing party" the right to get its attorneys' fees.

That means that anyone who wants to sue a drone operator can do so without paying their lawyer out of pocket.

Whatever you think about the law as a matter of policy, it's undeniable that lawsuits are going to pop up fast. This is Florida, after all.

So let's take a look at the new law. If you're a drone operator, take note: you're going to want to lawyer up if you operate in Florida.

A. "Surveillance," Defined

The 2015 law amends section 934.50, Florida Statutes. This statute was created by Florida's 2013 "drone law."

One of the amendments creates a definition for the term "surveillance." Statutory definitions of terms are important. A statutory definition makes it clear what the legislature "meant to say." This is key to lawsuits. Cases are often won or lost on arguments over statutory definitions.

The new definition of surveillance reads this way:

As used in this act, the term [ ] "Surveillance" means:

With respect to an owner, tenant, occupant, invitee, or licensee of privately owned real property, the observation of such persons with sufficient visual clarity to be able to obtain information about their identity, habits, conduct, movements, or whereabouts; or

With respect to privately owned real property, the observation of such property's physical improvements with sufficient visual clarity to be able to determine unique identifying features or its occupancy by one or more persons.

§ 934.50(2)(e), Fla. Stat.

Clear as mud? Exactly.

The language may seem understandable. Don't count on it staying that way for long.

Statutory language that seems clear gets complicated fast when you apply it to real life.

For example, in my "Florida tax litigation" practice, the statutory definition of a "sale" becomes is critical. If no "sale" occurred, then no sales tax applies. Without going down the rabbit hole into tax procedure (I love that stuff – don't get me started!), you can appreciate how much rides on a definition. (and trust me: whether a "sale" occurred at all can be a matter of intense debate…)

The definition of "surveillance" in the new drone law is super-broad. Conceivably, every picture taken with a drone would fall into this definition of "surveillance." It's not so hard to take a picture with "sufficient visual clarity" to determine whose house you're looking at. Google Maps will do that for you. And they're working from satellite photos.

The surveillance noted in the new definition applies by its terms only to pictures or videos taken by "drone" platforms.

So what is a "drone?"

That term was defined in the original "drone law" passed in 2013. That definition reads:

As used in this act, the term [ ] "Drone" means a powered, aerial vehicle that:

- Does not carry a human operator;
- Uses aerodynamic forces to provide vehicle lift;
- Can fly autonomously or be piloted remotely;
- Can be expendable or recoverable; and
- Can carry a lethal or nonlethal payload.

§ 934.50(2)(a), Fla. Stat.

That is a broad definition. It catches both sUAS as well as UAS platforms that are heavier than 55 pounds. So now we know that any pictures that are taken with any UAS platform may constitute "surveillance" under the act.

B. Prohibited "Surveillance?"

The act doesn't just define "surveillance," it prohibits it. We know from the definition of surveillance that nearly any picture of nearly anything is "surveillance" if it's taken from a drone.

So what kinds of surveillance is prohibited? That's defined, too. The statute reads:

PROHIBITED USE OF DRONES:

A person, a state agency, or a political subdivision as defined in s. 11.45 may not use a drone equipped with an imaging device to record an image of privately owned real property or of the owner, tenant, occupant, invitee, or licensee of such property with the intent to conduct surveillance on the individual or property captured in the image in violation of such person's reasonable expectation of privacy without his or her written consent. For purposes of this section, a person is presumed to have a reasonable expectation of privacy on his or her privately owned real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone.

§ 934.50(3)(b), Fla. Stat. (emphasis added).

Pardon my "bolding." This definition is extremely important.

Let's take it step-by-step.

1. "A person"

The prohibition on surveillance applies not only to state agencies, but to any "person." That means it will apply to both individual human beings and companies.

This is because the Florida Statutes define a "person" to mean a corporation or other legal entity (like an LLC, etc.). § 1.01(3), Fla. Stat. ("The word "person" includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.").

Therefore any individual or company flying a drone may be caught up in this prohibition.

2. "[A] drone equipped with an imaging device"

We have the definition of a "drone" above. It means every UAS you can think of.

What about an "imaging device?" The statute defines the term to mean "a mechanical, digital, or electronic viewing device; still camera; camcorder; motion picture camera; or any other instrument, equipment, or format capable of recording, storing, or transmitting an image." § 934.50(2)(c), Fla. Stat.

So any sensor counts. Every DJI Phantom with a GoPro is captured by this definition. Every high-end system with a multispectral camera counts, too.

3. "[T]o record an image of privately owned real property or of the owner, tenant, occupant, invitee, or licensee of such property with the intent to conduct surveillance"

Recall our definition of "surveillance." It doesn't "just" mean "spying" on someone. The definition includes any picture taken with "sufficient visual clarity" to identify property or a person. That's a pretty

basic capability.

Anyone that takes a picture or video with an sUAS platform equipped with an "imaging device" with "sufficient visual clarity" to identify a particular house may potentially violate the statute.

An additional point here, though. What does "intent" mean? Lawyers will have a field day with this.

Whether something counts as "intent" in this context will likely revolve around criminal case law. Section 934.50 is part of Title XLVII of the Florida Statutes. This title applies to "Criminal Procedure and Corrections." Chapter 934 itself applies to "Security of Communications; Surveillance." This means that the definitions of "intent" that crop up in cases dealing with related statutes in this chapter and title will impact what "intent" means in section 934.50.

It gets deeper, though.

The application of other surveillance definitions and case law to section 934.50 may get quite sticky. Why? Because our "drone law" defines surveillance in a unique way.

When you change the definition, the same word used in different contexts doesn't necessarily mean the same thing. So the existing "surveillance" and "intent" case law may or may not apply.

Clear enough? Welcome to my world – this is what lawyers do all day!

4. "[I]n violation of such person's reasonable expectation of privacy without his or her written consent"

This sounds nice, right? Who wants to have their "reasonable expectation of privacy" violated? As you might expect, this is more complicated than it seems.

We already know that "surveillance" includes taking any kind of picture or video that can identify a house or person. That kind of image can be taken by your smartphone.

So what does it mean that "surveillance" is prohibited when it violates a "reasonable expectation of privacy?"

The statute provides a definition of this term. It says that: "[f]or purposes of this section, a person is presumed to have a reasonable expectation of privacy on his or her privately owned real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone." § 934.50(3)(b), Fla. Stat. (emphasis added).

The lawyers in the crowd may have spotted a problem here.

The term "reasonable expectation of privacy" comes to us from Fourth Amendment Search and Seizure law. You may recall from your high school civics class that the Fourth Amendment to the U.S. Constitution protects citizens from "unreasonable searches and seizures" by the Government.

A whole body of case law has developed on the question of when the Fourth Amendment does and

does not apply. If the Fourth Amendment does not apply to a given situation, then the police do not have to get a warrant to gather incriminating information. (This is a drastic simplification – this can get very complex.)

In general, the Fourth Amendment applies when a citizen has a "reasonable expectation of privacy." If that expectation exists, then a warrant is required to conduct a Fourth Amendment "search."

Now, when you apply the "reasonable expectation of privacy" to aerial surveillance by law enforcement, what do you get?

The answer may surprise you: It's well established that you have no reasonable expectation of privacy if you can be seen from the air by the naked eye or through the use of cameras. If you are outside a structure, you're fair game for police observation. If you're inside a structure but there's a missing roof slat, anything visible through the opening is fair game. (As you might expect, most Fourth Amendment cases are about "drug" searches).

That brings us back to section 934.50(3)(b). Recall the definition of a "reasonable expectation of privacy" in the statute. What does it do?

It creates an "expectation of privacy" even if the person is visible from the air. And this expectation only applies to observation with drone technology. This definition is brand new and unprecedented. Can you guess what the result will be?

If you guessed "litigation," you win!

This is going to lead to court battles that may go on for years.

(If you're interested in more on this specific topic, I urge you to download this paper by Troy A. Rule, Law Professor at Arizona State University, Sandra Day O'Connor College of Law. Top-notch.)

When you add in the requirement of a drone operator gaining the "written consent" of every property owner that is potentially captured in an "image," you can appreciate the difficulty of complying with this law.

There has been talk that the entire law is unconstitutional and in conflict with the First Amendment. That topic is outside the scope of this post, but you can get a taste of the issue here.

You see how complicated this could get?

None of these issues were addressed in the legislature.

C. Now you can Sue a Drone Operator

It's one thing for "surveillance" to be "prohibited." It's quite another to discuss what happens when prohibited surveillance occurs.

If a state agency (think: law enforcement, etc.) violates the statute, a citizen can bring a lawsuit to stop

that violation. The party suing can also seek "all appropriate relief" that a judge may come up with to "prevent or remedy" such violations. § 934.50(5)(a), Fla. Stat. The term "state agency" in this statute captures much more than traditional law enforcement.

If a person (including a company, remember) violates the statute, a citizen can bring a lawsuit to both stop the violation and to get "compensatory damages" for violation of privacy. § 934.50(5)(b), Fla. Stat.

If that was all that you could get in a lawsuit, you'd be hard pressed to find a person willing to foot the bill to litigate it. The reason is that "damages" for invasion of privacy torts are notoriously hard to measure. So you'd end up suing, winning maybe $100, and paying your attorneys several thousand dollars for the trouble.

This statute makes lawsuits much more likely, however, by allowing the "prevailing party" to win attorneys' fees against the losing party. What's more, if the attorney takes the case on a contingency (to get a part of the amount won rather than the client paying out of pocket), the fees may be multiplied by two to create a bigger award. § 934.50(5)(b), Fla. Stat.

The funny thing about "prevailing party" fees, though, is that they go both ways. So if a property owner sues a drone operator and loses, then the drone operator can get a judgment against the property owner for its attorneys' fees.

[An aside: The statute also allows for "punitive damages" to be awarded. § 934.50(5)(c), Fla. Stat. Punitive damages are only allowed in Florida if the person being sued has done something really, really bad. Procedurally, punitive damages are expensive and difficult to litigate about. If a party tries to get punitive damages, fails, and then loses the case, the "blowback" of a larger attorneys' fee award may be much worse (because the other side had to spend more time and effort defending the punitive damages claim). Normal commercial operations are not likely to have 'PDs' in play.]

Litigation is quite likely to proliferate due to the attorneys' fees provision. Both drone operators and aggrieved property owners will find it easier to hire attorneys to fight out violations of the statute.

Buckle up: it's going to be a crazy ride.

D. Certain Commercial Operations are Okay!

Everything we've just covered is the "general rule." The statute does contain some exceptions.

If a drone operator is engaged in "a business or profession licensed by the state [of Florida]," then those operations are expressly carved out of the statutory prohibitions. § 934.50(4)(d), Fla. Stat. If such an operator is using a drone to "perform reasonable tasks" pursuant to its license, then those activities are "o.k." Id.

The exception to the exception is when that license involves intentionally gathering information about people. Id. Yes, Florida licenses private investigators.

Other "carve-outs" include: (1) property appraisers using drones in their operations; (2) capturing

images for electric, water, or natural gas utilities; (3) for “aerial mapping,” as long as the operator follows FAA rules; (4) for delivering cargo, as long as the operator follows FAA rules; and (5) to capture images necessary for safe operation of the drone itself (think: FPV flights beyond visual line of sight).

Now, will any of those carve-outs conflict with the general prohibition on surveillance? MAYBE!

The one thing you can count on is that this law will create new lawsuits.

Also, these carve-outs may have left out new, innovative uses for drone technology that no one has thought of yet. That means entrepreneurs with new ideas for the industry may find it hard to “get flying” in Florida.

Is this statute good policy? I don’t know. Maybe yes, maybe no. Regardless of whether you “like” the law or not, it’s now the law. So we’ve got to understand it and think about what its effects might be.

I encourage you to think about what the consequences might be. If you’re in Florida, you should contact your legislator to share your opinion! [See the the last chapter of my book for info on how to do that.]

This is a democracy, after all. We all get to have an opinion!