Powered by Marsh FINPRO

Episode 7

Managing D&O risks from startup to IPO

Welcome to the *Powered* by Marsh FINPRO podcast. Through a series of interviews with experts from across the energy and power industry, host Grace Brighter will examine key challenges and opportunities brought by the energy transition, and how to approach and manage the evolving management liability risks this transformation brings.

Sarah Baldys:

Welcome to the Marsh *Powered* by FINPRO podcast. Through a series of interviews with experts from across the energy and power industry, this podcast will examine key challenges and opportunities brought by the energy transition, and how to approach and manage the evolving management liability risks this transformation brings.

I am Sarah Baldys, US Power and Renewables Leader at Marsh's Financial and Professional Liability Practice.

The energy transition has ignited a surge in growth of companies focused on clean energy and innovative technology. This remarkable growth has been fueled by support of government policies and incentives such as tax credits and subsidies, alongside substantial investments from venture capitalists and private equity firms. A Bloomberg and EF report published in January of 2025 finds that global investment in the energy transition exceeded $2 trillion for the first time in 2024. However, navigating this fast-paced landscape presents its own set of challenges. Companies must not only attract and retain top talent, but also effectively raise capital, secure contracts with vendors, suppliers and customers, and manage regulatory compliance, all of which carry inherent risks for the organization and its leadership.

Risks change significantly as companies grow startups. Pre IPO and public companies have very different exposures and require different considerations. Understanding what your company's risks are at each stage of growth can be complicated but doing everything possible to manage those risks effectively and right size your D&O program as your company grows is essential for avoiding costly D&O litigation and for the long-term success of the company.

To dig into this, we're fortunate to be joined today by Paul Bissette. Paul is a partner at the law firm King & Spalding and serves as Co-chair of the firm's Corporate and Securities Litigation Practice, where he defends clients against securities and shareholder litigation, government investigations and enforcement actions, and complex business disputes throughout the United States. For more than 30 years, Paul has represented companies, officers and directors, underwriters and accountants in securities fraud class actions, shareholder derivative litigation, regulatory investigations, and bankruptcy D&O litigation. He regularly works with board committees, leading internal investigations and advising companies, governance and fiduciary duty issues.

Paul, I am so grateful that we have your expertise and insights here for our conversation today.

Paul Bessette:

Well, hi, Sarah. Thank you for having me.

Sarah Baldys:

So I think to start off before we get into some of the specifics of how D&O risks, you know, change, depending on different stages of growth. Just to level set, when we say D&O risk and D&O litigation, what do we mean? What are the key risks directors and officers of companies and what are the main sources of litigation?

Paul Bessette:

Well, I think there are two answers there, right? First is for D&Os and D&O litigation, we're really talking about litigation primarily by shareholders, whether public or private, against the directors and officers of the company. The main risk involved in D&O litigation on the private company side is breaches of fiduciary duty by the D&Os, and that means if they have, you know, acted not in the best interests of shareholders, if they have been self-interested, if they have been, you know, arguably self-dealing or involved in transactions where it's not entirely fair, let's say not the legal standard, but just colloquially speaking, to all the investors – that usually gives rise to D&O litigation.

On the public company side, more often than not, the main focus of D&O litigation, again, breach of fiduciary duty, but also public company, you know, stock price drops and that, you know, there's a whole cottage industry of plaintiffs lawyers that look for significant stock drops for public companies and they bring purported class actions against directors and officers, primarily based on misrepresentations and false statements that they allege were made and then when the truth was disclosed, somehow the stock just tanked and that gave rise to class action litigation. So that's really the focus of D&O litigation on a public company side…private company side is really focused on I think breach of duty for decisions made by the directors and officers…or, sometimes, inaction of the directors and officers.

Sarah Baldys:

Some considered D&O litigation to be mainly a risk for public companies, and that private companies have less risk. Is that true?

Paul Bessette:

Well, I don't know if I would say less risk. There is certainly D&O risk in private and public companies. It just takes a different form.

For a private company, for example, I wouldn't serve on the board of a private company unless it was, you know, D&O insurance available, right? I'm not going to put my personal assets at risk and that's how, certainly, directors should feel, and I think it's just as important for private companies as public companies to have D&O insurance. It's one of the main risk mitigation strategies. There's plenty of D&O insurance available for private companies and sometimes it can be packaged with other risks that are prevalent for small and emerging companies, like you know, cyber security risk, data privacy. Some, you know, there's some insurance, interesting insurance products that can be coupled with insurance for private companies that make a big difference because even though the dollars at risk for private company D&O litigation is certainly not the same magnitude as public companies, it's still significant and individual directors want to be protected.

Sarah Baldys:

Yeah, that's the case. So you know, thinking about the energy transition, it's really given rise to a lot of new companies. What D&O risks do startups and early-stage companies face?

Paul Bessette:

Well, startups and emerging companies, you know, they have a myriad of risks, legal risks. And I'm not, I don't even want to get into the business risk, right, I mean, yes, but there are a host of litigation risks, some of which touch these, some of which don't…certainly not directors, but all officers could be part of this, right.

So intellectual property risks, regulatory compliance, employment law issues, is a big thing. You know, that's really a trend in 2025 is just the change in how different employment issues are, how they're percolating, and how they're being decided. It's kind of a minefield for private and small emerging company clients and companies.

Depending on what stage they're in, also they have certainly liability and litigation risk contract and agreements…the risks about breach of, you know, contract and such. And even investor and you know securities risk if there's private offerings and exemptions for regulation that are, you know…mistakes being made, let's say. And so there are a myriad of legal risks that small emerging company companies have, and some of which would also affect directors.

Sarah Baldys:

What mistakes might a startup or an early-stage company make? Are there particular pitfalls that you've seen leading to litigation or negative outcomes?

Paul Bessette:

Ah, good question. I mean there are a lot.

I guess if I were going to try to boil it down from my experience, what I've seen is a small emerging company growing fast, and sometimes too fast, to have some corporate governance around their structure, some risk management analysis around their structure. They may not have the resources to obviously staff up and keep pace with the growth of the business, so employees and processes kind of lag behind the growth. Everybody's into the “go go growth,” which is great for investors in the company, but if you don't scale up the risk side, the mitigation side – that means getting the proper people in place with the right expertise, the right processes – then you're starting to open yourself up to some different risks and potential litigation because you're just not dotting the I’s and crossing the T's with respect to certain disclosures or financial projections to investors. Whatever the topic might be, [if] you don't have tight enough controls in place for what you're out there doing and saying, that inevitably leads to litigation.

Sarah Baldys:

This is such a good point for those early-stage companies that often have more limited resources than a big public company. They might have small staffs or tighter cash flow…are there best practices that you view as sort of simple but really effective that a company in that stage could really implement to avoid some of those pitfalls you were just outlining?

Paul Bessette:

Yeah, that's a good question, Sarah. I think it's a spin-off of what I just said. When there are limited resources, you want to employ those resources as best as you can, meaning the most efficient way, and I think getting a handle on the risks that are present for that business, right…so identifying what they are in a thoughtful way. Getting a group of key managers together and [saying], “let's brainstorm, what are the risks our business faces?”

Then they need to assess the likelihood or the probability of those risks happening, and what's the likely impact of those risks happening? Contemplate what are the consequences of these risks materializing to the business… you know, financially, reputation wise, with competitors, whatever it might be. And once you've got a handle on the risk and they can prioritize, “OK, where some of these risks are in our control, some are not. Let's focus our energies on the ones that are not and the ones that have potentially severe, you know, consequences.” And let's employ our limited resources in a way that we're being smart for risk that we can't control that could have a big impact on us and maybe less, you know, resources and focus on risks that we can control. We want to obviously control, we don't, we don't need to take as much energy to do that.”

So I think if you can identify, assess and prioritize the risk and you're going to manage your business better, in a way that, you know, with the limited resources you have, you're just being smart about how you're conducting business.

Sarah Baldys:

Yeah, and I think as companies then start growing and starting have you know they're bigger, they might have more resources and they start bringing in more revenue. When should they be thinking about increasing limits? Are there certain milestones to be aware of where risks of litigation increase as companies grow?

Paul Bessette:

Yeah, great question. You would hope there's like some easy formula like oh, our market cap is this or you know our revenue, is this…it's much more art than science. There's not a box you can kind of look at, [like] a template, and say, “yeah we land here so our limit should be between X&Y.” It’s much more nuanced. You need, you know, obviously a professional broker or insurer to get you information about what your competitors are doing, what size they are. You want to get a sense for the landscape of D&O limits and get professional advice.

A rule of thumb is essentially, you want to look at D&O limits to serve two purposes: One, if you are hit with a D&O lawsuit that triggers the insurance…first off, good, because if it doesn't trigger the insurance, you're out of pocket. So if it triggered the insurance, the risk is transferred essentially after some deductible or retention amount to the carrier. And you need to have limits that will help. We’ll cover the litigation costs. And then any potential so, because the litigation costs and most policies, when they're not a duty to defend on the carrier, that means the client gets to pick counsel and the insurance company pays that counsel, the insurers got to approve of that counsel’s track record, cost. All that goes into that approval process. But the limit should be sufficient to cover anticipated losses from litigation after you've run through the risk assessments, you sort of maybe have a sense for what that would be and what potential damages could be and then have sufficient limits to cover litigation costs and potential settlement.

Where that number is, it's tough to say, but as your business grows, what is your valuation as a private company? What are the potential litigations you could be facing? And when you do your risk assessment, you'll have a sense of that. Then you can pick limits that are sufficient to cover the litigation, protect the D&Os, but not so much if you become a target for plaintiffs' lawyers, because if you've got too much insurance…and obviously that won't be a known fact until the litigation starts and that's a discoverable fact. And then plaintiffs' lawyers see that, "Wow, this company is way over insured. We're not settling this on the cheap, we're going to go all the way. We're going to get as much insurance money as we can."

So you don't want to be a target, but you don't want to leave exposure for your Ds & Os, so it is an important consideration and thought process. Ultimately, a decision to make is what are the appropriate limits and [do] they need to be scaled as your business grows.

Sarah Baldys:

And as a company grows, they may begin eyeing an IPO. And I know that there are specific risks that then emerge both when you're on in the process of being in the pre-IPO stage but getting close and then at the IPO. And I've even heard people say things, you know, that a D&O suit is practically inevitable when you have an IPO. I don't think that's the case.

Paul Bessette:

It's actually not. You would think because the basic construct of a newly public company going out with an IPO is plaintiffs don't have to prove fraud. They just have to prove that there was a misstatement in the offering documents.

So the issue of the intent to deceive or defraud is gone from a regular securities fraud class action for a public company…has been public a while and makes misrepresentations and the stock drops. A newly public company, an IPO company, within the first three years, a plaintiff's lawyer can sue into class action and not show there was an intent to deceive or defraud, just that there was a negligent misrepresentation in the offering documents. That's…that's a serious lawsuit because the plaintiffs don't have a big pleading burden or liability burden to meet. So you would think that plaintiffs, lawyers would be bringing IPO suits all the time. And it's interesting because a fair number of times the public company, the newly public company, the stock price ends up within a couple of years below the IPO price. That's really the trigger. That's when a plaintiff's lawyer would sue when the current price is below the offering price. Oftentimes we see that being the case, but no lawsuits fraud.

And as a defense lawyer, I'm kind of surprised because there's a fair number of times that the stock price ends up within the first couple three years below the IPO price and no lawsuits [are] filed.

So it's not the case that [a D&O suit] happens a lot. Theoretically it should happen more often than it does, but luckily for the industry and for insurers and for newly public companies, it's not as frequent as you might expect.

Sarah Baldys:

So if I was a company preparing for an IPO, are there best practices or even just special things that I might need to be taking into consideration at this phase so that I'm ready?

Paul Bessette:

Well, I think…the more I guess, once you're close, you're talking to a bunch of advisors, right? Your bankers, your lawyers, all sorts of professionals. So it's really the year or even more before then when you're a pre-public company and you've got the idea, you know – you've got the product, you've got the sales, you're in a space that it makes sense to maybe tap into the public markets. But it's not going to be six months or a year. [It] might be 18 months or something, or even two years.

But in that window between, you know, six months out and two years out, do you want to act like you're a public company now? You need to make sure your corporate governance, processes, [and] policies are vetted and gone through with professional advisors, and you are locked into acting as you as if you were a public company. And that's just going to help your valuation, it's going to make it easier to transition. It's going to decrease your risk going forward.

So…but again, as we talked about earlier: if you don't have the resources, you've got to weigh what you can do and then maybe, if you don't have the resources, you probably shouldn't be thinking about going public. You've got to get your internal house in order. A good year to 18 months before, you [should] start that process because it's just going to make it easier, it's going to decrease your risk, you're going to look better to the professionals, the bankers, the audit firm, the lawyers, when you're a "together company," well before you need to be.

Sarah Baldys:

Are there particular trends that you're seeing in litigation, or [in the pre-IPO phase]?

Paul Bessette:

Not really. I mean, I don't see anything there. I haven't had too much private company litigation. I've had some that's been mostly about events. So something, let's say, based on a contract, or a data theft, or some other triggering event caused [by] some litigation.

What I do see is the flip side. I see public companies, newly public, going out and even though they went through all the processes to go public, you would think…and I get surprised all the time when I see that, well, no, [the public company doesn't] have the processes in place. They don't, you know, their board committees, their corporate governance documents and policies aren't complete enough. They haven't really "staffed up," if you will. They're kind of flying by the seat of their pants. Yes, they're public, but they don't act like they're public, and they're issuing press releases and making claims about new deals and contracts that haven't been vetted by their auditors or even their board. There's a tendency to exaggerate and make your company look better, so the stock price pops and that has other benefits for you down the road, but you're trading off the risks, and that should all be part of a complete risk management plan, corporate governance procedures, and not all public companies have those, surprisingly, and that those are the ones I see, oftentimes the small caps, getting sued for securities fraud because they're loosey goosey about how they run their public disclosures.

Sarah Baldys:

I've been curious. We're in a world where there are lots of different ways that people are communicating, whether it's Twitter or texts or you know…are there rules surrounding what counts as a disclosure?

Paul Bessette:

Great question. I wish more employees would know about this concept because you know, you'd be surprised in every case that I've had, and in 35 years – probably hundreds of securities cases – when [plaintiffs] get to the discovery phase, if they do, inevitably, there are these emails from employees flying around that just put the whole case upside down because they're saying things as if they don't think people are going to read them. [They think that] only the person they sent the e-mail to is going to read [the email] and it's just not the case.

Sometimes I've seen, "Yeah, the president's committing fraud by doing this" and "I can't believe we don't [have] quality control" [or] "This actually went out the door in this shape" or something like that. Like, what are you thinking? And it's not just one off. I see it a lot of times, not so blatant as that, but shorthand talking and colloquialisms and just short ways of saying things and employees not really thinking that this document could be public someday, and I better be careful about what I say.

And that's just emails, let alone now if we're talking about texts or instant messages of some sort. It's just the more informal communication that you make, people just think that others aren't going to see it, and it makes a big difference in litigation. So it's not so much what is the company saying publicly, but if the internal messages, whether it's emails or some other texts or apps or whatever… all these communication functions is where the gold is. It's where the plaintiffs look.

You know, that's where they know they're going to find some gold and they're going to prevent the defense winning on summary judgment, meaning you're going to go to trial or you're going to settle it, but you're not going to win on a summary judgment because there's too many fact issues about what this message meant and what this e-mail was… or those people get deposed and it's even worse.

So yeah, the more informal messaging platforms cause people to just say things that you know they're not thinking about. They're not thinking of litigation risk, they're just communicating, and that causes all kinds of problems.

Sarah Baldys:

And it certainly seems like, almost every year, the channels for those more informal communications become more embedded in our workplace with, as you say, different apps, and so it sounds like that's something that risk managers could really hone in on, you know, with this risk in mind.

Paul Bessette:

They should, not only for employees and officers, but then you've got the directors to think about, right? They're not on generally the company platform for e-mail. They're at their Gmail address or whatever else, right? They have their independent devices and you know they're more savvy people generally speaking and so you're not going to see too much there, but directors need to know when they're communicating with their company or fellow board members – and just because it's not on e-mail, just to an instant message or whatever it is, it will also come under the litigation hold that there's litigation and that will be discoverable by at least your attorneys, if not the plaintiff's attorneys.

So there should be an awareness and some thinking, and that all falls under the risk management folks or the GC or however it is in different companies. But employees, officers and directors should be aware of company communications [and] need to be professional at all times.

Sarah Baldys:

And thinking about some litigation trends in the power and renewable space, we've seen litigation stemming from a high level of investment dollars for projects that might be years off from completion. Shareholders and investors can become frustrated with project delays or concerns and promises that have been made and you alluded to this before, promises made to investors or customers or shareholders won't be delivered on. Then [that] leads to that coming of the public statements and disclosures that were made to see what can be found, you know?

And then on this, we've seen recently some upticks in short seller-related litigation, both in power and renewables companies [and] maybe outside of this industry. Can you talk a little bit about what that is and if it can be avoided?

Paul Bessette:

Yes, well, short seller litigation, I think, encompasses several things, right. It's mostly a public company issue and there are no less than a dozen or so short seller services… there's a bunch of them that, you know, their business is essentially to sell a stock short and then write about that company in a way that will cause the stock to drop. So they make their money by saying “We're going to short Company A,” and then here comes a scathing research report about all the bad things happening at Company A and it's, you know, it's confidential witnesses, it's generally not well sourced, but it's written in a way like, oh, this person must know what they're talking about.

And inevitably, in every one of these short reports are disclaimers that, well, what we're saying may not be truthful and we only know certain things.

In other words, it's screaming at investors, “Don't rely on this because we may not know what we're talking about.” But inevitably it drops the stock and then plaintiff's lawyers will bring a securities class action and claim that the company was misleading the public about AB and C because mister short report over here wrote about AB and C and that caused the stock to drop. And so it is a source of litigation, if you will, for plaintiffs' lawyers who look for companies that are being subject [to] short reports. And the short report service, you know, they make their money because the stock dropped. And plaintiffs' lawyers want to make their money because they sue the company based on the stock drop.

The other piece of this is some companies rightly get pissed off. And you know, [say that] we're the subject of a short attack, you know. Whatever they're saying is not true. They say we have all these financial issues, [but] we have audited financial statements and they haven't been restated, and you've come out with this report and our auditors haven't withdrawn their opinion. Our financials are fine.

You know, so they want to sue the short seller, and they take two steps: They want to get mad and they want to sue the short report for defamation, making false statements, that sort of thing. It hasn't been very successful. There [have] been one or two cases over the last, say, 10-15 years, maybe a couple more that have been successful, but most have not.

And then there's also been a pitch by these companies who are subject to the reports. They go to the SEC and say, "These guys are manipulating the market. They're causing…they're saying false statements and causing the stock to be dropped and benefiting from that. They're a biased short seller. SEC, you're supposed to be the policeman of the markets. You need to do something."

And you would think that message actually kind of makes sense. It remains to be seen in the new administration how [that message] would be received. But I can tell you over the last, you know, 10 years, multiple different administrations…the SEC kind of looks at short sellers as they're doing a service to the industry. They're keeping the companies, you know, honest, which I don't see, but that's been the justification. So the SEC hasn't really stepped up in the past to do anything about the short sellers.

So finally there's been some recent litigation, but the whole short seller activity, it cuts across different industries. To me it's a real problem. Luckily it hasn't hit too many companies, I would say, you know, there are essentially around 250 securities class actions brought in a given year, almost one every business day, and probably no more than less than a quarter are spawned from short selling reports. So it's not a majority of the cases, it's a small problem, but it's a frustrating problem for companies [to have to get involved with].

Sarah Baldys:

Yeah. So talking about another topic, [there is] a risk that no one wants to talk about when things go wrong: bankruptcy. So what D&O risks come along with bankruptcy, or what can directors and officers, when they're in this situation, what can they do to sort of try to manage their risk for D&O litigation during that bankruptcy process?

Paul Bessette:

For a director [or] an officer, you want to have side A insurance. So you want to make sure when you're talking with the risk manager or the general counsel or whoever's managing the limits year to year that there's sufficient side A coverage for the D's and O's.

What I mean by that is, you know, there are different types of D&O insurance, so the entity itself, the company, can be covered as an entity in and of itself. More often than not, the directors have identification agreements by the company. The company agrees to identify them and pay their litigation cost and settlement and that's fine. That's usually, you know, side B. But let's say the company goes bankrupt [and the] company doesn't have the ability to fund the defense of it[self], just [the] D's and O's. Well, then there should be side A, which is just for the D's and O's. It's a separate limit. The company can't touch it. Once the company is not able to identify the D's and O's, the side A kicks in.

So if you're a director of a company, you want to make sure there's adequate side A limits, because if a company goes bankrupt, you still need to be protected and not have your personal assets [be put] at risk.

Sarah Baldys:

So finally, as a way of sort of rounding out our conversation, which has been fantastic and I feel like I've learned a lot…do you have advice or parting words? If you could give maybe one piece of advice, but don't feel limited to one, to directors or officers or risk managers on managing D&O risk and increasing, maybe the chance of dismissals because sometimes litigation is going to happen. So are there best practices to maybe increase the chance of dismissals?

Paul Bessette:

Well, yeah. I mean, we've been talking a lot today, Sarah, about risk. And I think as you just said, managing risk, I mean that to me is the key and that requires several things. Making sure your internal house is in order, you've got proper risk management procedures, you've got a chain of command of people within the company and know what they're doing. Who's responsible for what? Have we identified all the risks? And we've been thoughtful about this? Do we have proper policies and procedures in place? Because, as you say, litigation is going to happen. That's just the nature of business. And so you want to be prepared internally.

Externally, insurance is a key minimizer of risk. It will take care of the costs associated with risk, hopefully [take] the company exposure off because you can, if you will, offload it or unload it to the insurer at a cost. But you know you will be protected on the financial side, and internally you're doing everything you can to minimize risk and have the proper procedures in place. I mean, I think that probably to me [is] the two biggest areas that need to be focused on to minimize risk in any business cutting across any industry…public or private, for that matter.

Sarah Baldys:

Well, Paul, this was just a great conversation. I really appreciate all of your insights and I know that all our clients and listeners will as well. So thank you so much for your time.

Paul Bessette:

Absolutely. I hope this is helpful and I really enjoyed it too, Sarah, thank you.

Grace Brighter:

That's all for this edition of *Powered* by Marsh FINPRO. We hope you enjoyed our discussion and thank you for listening. You can rate, review, and subscribe to *Powered* by Marsh FINPRO on Spotify, Apple Podcasts, or any other app you're using. You can also follow Marsh on LinkedIn or X.

In addition to your podcast feed, you can find more episodes of *Powered* by Marsh FINPRO at marsh.com/poweredbymarshpod, and more insights from Marsh on our website marsh.com. Until next time, thanks again for listening.