Claims Examples (based on actual claims filed)

- Example 1: Company entered into an agreement with an investor for equity and warrants. Dispute arose as to whether the period in which to exercise the warrants had passed. Investor sued the Company for breach of the warrant agreement and 3 officers, including the CEO, for fraud. Case was settled for stock, but the Company incurred in excess of $1M in Defense Costs.
  - Result: carrier had a contract exclusion with respect to the Company (which is common). Exclusion did not apply to individuals so it became an allocation negotiation, with carrier ultimately contributing 60% towards Defense Costs. We considered this low but the carrier took a hard line position (original position was 30%) but the Insured elected to not pursue litigation against the carrier.

- Example 2: Ds and Os were sued by a minority shareholder in connection with a proposed M&A transaction alleging, among other things, self-dealing and fraud. Case was settled for $2.5M, inclusive of $750K for defense costs.
  - Result: although there is a fraud exclusion in every D&O policy, the carrier must respond until there is a final, non-appealable adjudication that the fraud actually occurred. As the case settled, the exclusion was never implicated. Insured received full recovery excess of the retention.

- Example 3: Company and Ds and Os were investigated by the Department of Justice for violations of the Foreign Corrupt Practices Act. Investigation was ongoing over a number of years. Total cost of defense was in excess of $3M and fines were assessed against the Company and the CEO.
  - Result: investigations are one of the most complex coverage areas within D&O but in general formal investigations are only covered against individuals. Through negotiation $2.5M in defense costs were recovered. Fines and penalties are generally not insurable under most D&O policies (although this trend is changing). It should also be noted that regulatory authorities will often prohibit the use of insurance for fines and penalties.

- Example 4: Company and Ds and Os were sued for fraud, misrepresentation and breach of contract by various investors and vendors. Company ultimately filed for Chapter 11 protection.
  - Result: Case is ongoing but prior to the bankruptcy the carrier excluded the contract claims against the company under the contractual liability exclusion but did acknowledge defense for individuals. Policy had a $500K retention. Once the company filed for bankruptcy they were unable to continue indemnifying or advancing the individual defendants' Defense Costs. The remaining $200K in the retention was waived for individuals (since it was now deemed a non-indemnified claim) and the carrier immediately started covering costs at that point.

Claims Examples (based on actual claims filed)

- Example 5: Company and Os were sued for unfair and deceptive business practices in a consumer class action. Case was ultimately dismissed but $850K in Defense Costs were incurred.
  - Result: Policy had an antitrust exclusion that included unfair and deceptive business practices allegations (which is common). The exclusion was limited to the Company and provided a $250K Defense Costs carve back or coverage grant. Negotiations over allocation began with a baseline of $250K via the Defense Costs carve back and final contributed amount was $650K.

- Example 6: Company received a derivative demand by an investor. Company created a special committee of the Board and hired counsel to investigate the merits of the derivative demand. Total investigative costs were $850K, with a recommendation that a suit not be filed against the former Ds and Os. Investor took no further action (was bought out as part of an exit agreement).
  - Result: The derivative demand does not constitute a Claim, but the policy included a $250K extension towards the cost of the investigation that is *not* subject to any retention. Unfortunately the prior broker failed to notice the derivative demand and thus the Company was not able to recover any of its investigative costs.

- Example 7: CEO and founder sued for sexual harassment and wrongful termination, by the head of sales, but the draft complaint also included allegations that he lied to investors during their Series D round. Company engaged outside counsel to conduct an independent investigation. Case is currently in arbitration.
  - Result: The core of the dispute is employment practices related and is being covered, but the D&O allegations also implicated that part of the policy. Defense costs are being covered, but a dispute arose with respect to the investigation because defense counsel recommended the use of a third party investigator, which is unusual. Carrier initially argued that the use of a third party (and not defense counsel itself) was not a "reasonable" expense under the definition of Defense Costs. Ultimately had the entire $85K of investigative costs covered.

- Example 8: CEO and founder sued for fraud (over multiple actions taken) in a highly complex and contentious litigation. He refused to use approved defense counsel. Case is ongoing and in excess of $350K has been spent to date, just by the CEO:
  - Result: There issue here was not so much coverage but the CEOs failure to follow policy guidelines by using unapproved counsel. As a result, the carrier disclaimed any responsibility for the costs incurred, including counting those costs towards satisfying the $500K retention. We continue to negotiate with the carrier, but that discussion is now more focused on negotiating a larger settlement / claims release by the carrier (they are offering half of the policy limit in exchange for a full release from any future liability).