IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

VALLEY FORGE INSURANCE CO.,	)	
	)	
Plaintiff,	)	
v.	)	C.A. No. N10C-07-135 JRS CCLD
	)	
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, FIREMAN'S FUND INSURANCE COMPANY, BLAIR LLC, AND ORCHARD BRANDS CORP.,	)	
	)	
Defendants.	)	

Date Submitted: February 10, 2012
Date Decided: March 15, 2012
Corrected: March 16, 2012*

MEMORANDUM OPINION.

Upon Consideration of Plaintiff Valley Forge Insurance Co.'s Motion for Summary Judgment.

GRANTED.

Upon Consideration of Defendants National Union Fire Insurance Company of Pittsburgh, PA and Fireman's Fund Insurance Company's Motions for Summary Judgment.

DENIED.

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* Corrected as to cover page only.

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SLIGHTS, J.

I.

Several significant product liability claims brought by consumers against defendants, Orchard Brands Corporation ("Orchard"), Blair Corporation, LLC ("Blair") and others have given rise to an insurance coverage dispute between Blair and Orchard's primary and excess insurers with regard to the extent of the primary insurer's coverage. The primary carrier, plaintiff, Valley Forge Insurance Co. ("Valley Forge"), seeks a declaration that the various claims that have been filed against Blair and Orchard amount to a "single occurrence" under its policy such that its indemnity and defense obligations will terminate upon the exhaustion of its $1 million "per occurrence" coverage. The excess carriers, defendant, National Union Fire Insurance Company of Pittsburgh, P.A. ("National Union"), and defendant, Fireman's Fund Insurance Company ("Fireman's Fund"), contest Valley Forge's characterization of the underlying product liability claims and argue, instead, that the Court should declare that each claim constitutes a separate "occurrence." If the Court accepts the excess carriers' view of the underlying claims, then Valley Forge's indemnity and defense obligations will not terminate until its $2 million "aggregate" coverage has been exhausted.

The parties disagree regarding choice of law. Valley Forge urges the Court to apply Delaware law, as the law of the forum state, because there is no conflict

between the laws of Delaware and any other state with a significant relationship to this dispute. National Union disagrees that there is no conflict among the potentially applicable state laws and argues that the Court should apply Massachusetts law.

The parties have filed cross motions for summary judgment and agree that the controversy is ripe for decision.[1] After careful consideration, the Court has determined that Delaware law should govern this dispute and that, under Delaware law, the product liability claims against Blair and Orchard at issue here constitute a "single occurrence" as defined in the Valley Forge Policy. As such, Valley Forge's indemnity and defense obligations are limited to the exhaustion of its $1 million "single occurrence" coverage. Accordingly, Plaintiff's motion for summary judgment is **GRANTED** and Defendants' motions for summary judgment are **DENIED.**

II.

A. The Parties

1. The Insureds - Blair and Orchard

Blair is a Delaware limited liability company.[2] Its sole member is Appleseed's

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[1] Fireman's Fund joined National Union's motion for summary judgment arguing for a finding that the various claims against Blair and Orchard constitute multiple occurrences for purposes of the per-occurrence limits in Valley Forge's coverage policy. *See* Fireman's Fund's Joinder of Motion for Summary Judgment, D.I. 40060564 (Sept. 27, 2011).

[2] Deposition of Brenda J. Schnick (30(b)(6) corporate designee of Blair), No. N10C-07-135-JRS/CCLD, D.I. 40023547 (Sept. 13, 2011) (hereinafter "Schnick Dep.") at 17:2-7; 20:22-24.

Intermediate Holdings LLC.[3] Appleseed's sole member is defendant Orchard, a Delaware corporation based in Massachusetts.[4] Orchard, in turn, is a wholly-owned portfolio company of Catalog Holdings LLC ("Catalog").[5] Orchard provides administrative, finance, tax and accounting services to Blair, including the negotiation and procurement of insurance on Blair's behalf.[6] The three insurance policies at issue were issued to Catalog and "all subsidiary, affiliated or associated companies, corporations, entities or organizations," including Blair.[7]

Blair sells apparel products to consumers in the United States through a handful of retail stores, catalogs, direct mail solicitations, and an internet website.[8] The products are shipped from Blair's Irvine, Pennsylvania, distribution center.[9] Blair is headquartered in Warren, Pennsylvania, where it has been operating for over 100 years.[10] Neither Blair nor Orchard take a position on the motions *sub judice*.

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[3] *Id.* at 20:25-21:6.

[4] *Id.* at 20:25-21:6, 23:22-24; 171:23-172:22.

[5] *Id.* at 18:16-19:3.

[6] *Id.* at 22:5-23:21.

[7] Valley Forge Complaint, D.I. 32156888 (July 15, 2010) (hereinafter "Compl.") at Exs. A-C. Orchard and Blair seek coverage under these policies as "Additional Insureds." Compl. ¶ 12.

[8] Schnick Dep. at 30:21-11; 31:19-32:10.

[9] *Id.* at 61:4-11.

[10] *Id.* at 3-4.

2. The Insurers - Valley Forge, National Union and Fireman's Fund

Valley Forge issued a primary general liability policy to Catalog, effective June 1, 2008 through June 1, 2009 (the "Valley Forge Policy"), for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damages' to which this insurance applies."[11] Valley Forge's "right and duty to defend [the insured against any 'suit' seeking those damages] ends when [Valley Forge] ha[s] used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A [Bodily Injury and Property Damage] . . . ."[12] The per occurrence limit is $1,000,000;[13] the aggregate limit is $2,000,000.[14] "Occurrence" is defined within the policy as an "accident, including continuous or repeated exposure to substantially the same harmful conditions."[15]

National Union issued an excess liability policy to Catalog effective June 1, 2008 through June 1, 2009 (the "National Union Policy").[16] National Union's excess

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[11] *See* Compl. Ex. A, Renewal Declaration (GL Policy No. C2090331520); Commercial General Liability Coverage Form, Section I, Coverage A(1)(a), p. 1 of 14.

[12] *Id.*

[13] *Id.* at Declarations, p. 2 of 4.

[14] *Id.*

[15] *Id.* at General Commercial Liability Form, Section V, Definitions ¶ 31, p. 12 of 14.

[16] Compl. Ex. B (Policy No. 5443224).

coverage sits directly above the Valley Forge primary coverage.[17] The National Union Policy requires:

> [National Union] to defend any Suit against the Insured that seeks damages for Bodily Injury, Property Damage, or Personal Injury and Advertising Injury covered by this policy, even if the suit is groundless, false, or fraudulent, when: 1. the total applicable limits of Scheduled Underlying Insurance [the Valley Forge Policy] have been exhausted by payment of Loss in which this policy applies . . . .[18]

The policy has a $25,000,000 limit of liability per occurrence and a $25,000,000 aggregate limit in excess of the limits afforded by the Valley Forge Policy.[19]

Fireman's Fund, a second-layer excess carrier, issued coverage to Catalog for the policy period of June 1, 2008 to June 1, 2009 (the "Fireman's Fund Policy").[20] The Fireman's Fund Policy has a $25,000,000 limit of liability per occurrence and a $25,000,000 general aggregate limit in excess of the limits of liability of the Valley Forge and National Union policies.[21]

Blair has sought coverage from Valley Forge and National Union with regard

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[17] The National Union Policy lists the Valley Forge Policy as "Scheduled Underlying Insurance." *Id.* at Underlying Scheduled Insurance, AH0006.

[18] *Id.* at Commercial Umbrella Liability Policy, Section III, Defense Provisions ¶ A.

[19] *Id.* at Declarations, AH0876.

[20] Compl. Ex. C (Policy No. SHX-000-8088-3424).

[21] *Id.*

to the so-called "Robe Claims" (described in detail below). The record reflects that Valley Forge has expended $910,000 in settlement of the Robe Claims against Blair and Orchard.[22] National Union has acknowledged its obligation to defend and indemnify Blair in connection with the Robe Claims but only after Valley Forge's coverage has been exhausted. For its part, Fireman's Fund has acknowledged its position as the high excess policy triggered upon exhaustion of the underlying insurance policies.[23]

B. The Product - The Chenille Cotton Button Front Robes

From January 2003 through May 2008, Blair spec'd , imported, inspected and sold a product known generally as the Full Length 100% Chenille Button Front Robe Style No. 30931 (the "Robe(s)").[24] Blair acquired the Robes from a supplier and manufacturer, A-One Textile and Towel Industries ("A-One"), located in Karachi,

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[22] *See* Schnick Dep. at 143:2-3; 167:20-23; 169:2-4, Ex. 35.

[23] Defendant Fireman's Fund Insurance Company's Response to Plaintiff's Motion for Summary Judgment, D.I. 40589587 (hereinafter "Fireman's Fund Resp.") (Oct. 27, 2011).

[24] Schnick Dep. at 32:11-33:5; 37:4-9; 158:16-159:6; Ex. 36 (Blair's Section 15(b) Letter, dated April 7, 2009). Between January 1, 2003 and May 8, 2008, Blair purchased 162,490 Robes under Style No. 30931. *Id.* Prior to 2003, Blair purchased approximately 130,000 Robes under Style No. 17434. *Id*. at 34:11-36:14; 130:18-25. Both style numbers were assigned to the same robe product with the same product design. *See id*. at 169:5-23.

Pakistan.[25] Blair ordered the Robes in shipments of specified quantities and colors.[26] A-One separately purchased the raw fabric materials, created the 100% chenille cotton and manufactured the Robes pursuant to the product design provided by Blair.[27] The product design, material and general appearance of the Robes did not change in any significant respect between 2003 and 2009.[28]

A-One was subject to quality control inspections which included in-line and final inspections to check for defects in the physical characteristics of the Robes.[29] In addition, the fabric for the Robes was subject to federal flammability testing standards implemented by the Consumer Product Safety Commission ("CPSC").[30] Until 2006, the inspections were facilitated by Blair. Thereafter, the inspections were

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[25] Schnick Dep. at 36:23-38:8.

[26] *Id.* at 40:3-10; 61:23-62:5; 67:4-8, Ex. 10.

[27] *Id.* at 36:19-24; 40:3-41:16; 43:9-21.

[28] *Id.* at 43:23-44:23. In June 2002, the Robe pattern was modified by revising the front yoke shaping, adding a 1-1/2 inch sleeve cap, and revising the armhole measurement. *Id.* at 48-50. In January 2007, the Robe pattern was modified by removing certain fabric from the yoke and body at the sideseam/armhole seam and by removing 1/2 inch of fabric at the back yoke. *Id.* at 56-58. A proposed elimination of the bottom button, shortening the sleeves and shortening the robe's overall length in March 2009 were considered but never placed into production because of Blair's product recall. *Id.* at 56:9-59:20.

[29] *See* Schnick Dep. at 68:4-71:23; 77:6-13.

[30] *Id.* at 72:1-76:4; 77:6-13. CPSC testing services were provided at different overseas locations. *Id.* Generally, the Robes met CPSC standards, but differed slightly from lot to lot and sample to sample. *Id.* at 80:21-82:1.

arranged by Blair affiliates who worked with several different testing vendors (primarily various entities of Bureau Veritas, the Société Générale de Surveillance Group ("SGS"), and Specialized Technology Resources, Inc. ("STR")).[31] After overseas testing and quality control inspections were completed, the Robes were shipped to Blair's central distribution facility in Irvine, Pennsylvania. From there, the Robes were sold all over the United States at a range of different prices, using different channels of sale.[32]

C. The Insured Loss - The "Robe Claims"

In early 2009, Blair became aware of several reports that consumers had been burned when their Robes came in close proximity to heat sources.[33] In response to these reports, Blair submitted six fabric samples pulled from each of the production lots in Blair's warehouse for flammability testing. The initial testing by SGS suggested that four of the six fabric samples had not met federal flammability standards. These results caused Blair, on April 21, 2009, to initiate a voluntary recall of approximately 158,000 Robes manufactured by A-One with the Style No. 30931.[34]

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[31] *Id.*

[32] *Id.* at 29:21-30:11; 31:19-32:10; 84:9-88:12; 157:25-158:9.

[33] *Id.* at 88-90.

[34] *Id.* at 92:13-95:13. In actuality, after a full review by the CPSC in August 2010, SGS reported that it had incorrectly classified the results and the six samples had actually passed

In October 2009, "out of an abundance of caution," Blair expanded the recall to include certain other chenille products that had been manufactured by A-One.[35]

In September 2009, Blair was served with a lawsuit by Harold Ledbetter, as administrator of the Estate of Annie Thrash.[36] The lawsuit was filed in the United States District Court for the Middle District of Alabama against Blair and several other entities.[37] Mr. Ledbetter alleged that Ms. Thrash died as a result of burns she suffered on October 30, 2008, when her Robe caught fire while exposed to a gas stove in her Opelika, Alabama home.[38] The claims were for defective design, manufacture and warnings under Alabama's Extended Manufacturer's Liability Doctrine, and for negligence and wantonness in connection with the Robe's design, engineer, manufacture, testing, sale, marketing, and warnings.[39]

On October 22, 2009, Sharon Davis, as executrix of the Estate of Atwilda Brown, filed a claim in the United States District Court for the District of Connecticut

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flammability testing. *Id.*

[35] *Id.* at 127:4-11, Ex. 31. The notice of recall informed consumers that there were a total of nine deaths resulting from the burn hazard of the Chenille Robe. *Id.* Approximately 300,000 products were part of the total recall. *Id.* at 131:1-2.

[36] Schnick Dep. at 98-100, Ex. 18.

[37] *See id.* (naming various entities of Bureau Veritas, SGS and STR as additional defendants).

[38] *Id.*

[39] *See id.*

against Blair and Catalog following Ms. Brown's February 27, 2005, death from injuries she sustained when her Robe came into contact with a hot electric stovetop.[40] Ms. Davis brought her claims under the Connecticut Product Liability Act and alleged that the Robe was defective in design and manufacture for, *inter alia*: utilizing defective chenille fabric; failing to treat the chenille with flame retardant chemicals; and failing properly to test the Robe or warn consumers of its unreasonably dangerous characteristics.[41]

A day later, Blair was served with a complaint filed in the California Superior Court by Michelle Putini, as successor-in-interest to and administratrix of the Estates of Evelyn and Murray Rogoff, after Mr. and Mrs. Rogoff died from burns they sustained on February 4, 2009.[42] The incident occurred in the Rogoff's home in Oceanside, California when Mrs. Rogoff's Robe came into contact with a hot electric stove.[43] The complaint included products liability claims and a claim for violation of the Federal Flammable Fabrics Act.[44]

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[40] *See* Schnick Dep. at Ex. 26.

[41] *Id.* at p. 6.

[42] *See* Schnick Dep. at Ex. 25. Defendants included Blair, Golden [G]ate [sic] Capital and Orchard. *Id.*

[43] *Id.*

[44] *Id. See* 15 U.S.C. § 1192.

Patti Bingham filed a lawsuit against Blair on January 5, 2010, in the United States District Court for the Western District of Washington for injuries she sustained when, on December 5, 2008, her Robe came into contact with a lit cigarette lighter.[45] Cody Bingham was also injured while attempting to extinguish the fire. The injuries occurred in Tenino, Washington, and the claims included design defect, failure to warn, failure to comply with federal statute, breach of warranty, bystander liability and infliction of emotional distress.[46]

On March 12, 2010, Jane Axford filed a complaint against Blair in the Supreme Court of New York for the County of Erie, for injuries she sustained when her Robe came into contact with the flame from a gas stove.[47] Ms. Axford claimed that the Robe was "defective, unreasonabl[y] [sic] dangerous and unfit for use."[48] In addition, Ms. Axford alleged that Blair failed timely to recall the Robes and breached its warranties of merchantability and fitness.[49]

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[45] Ms. Bingham's First Amended Complaint was filed on May 5, 2010. *See* Schnick Dep. at Ex. 27. Ms. Bingham listed Blair, Appleseeds Topco, Inc., Orchard, Catolog and Susan D. Carlson as defendants. *Id.*

[46] *See id.*

[47] *See* Schnick Dep. at Ex. 28. Defendants included various entities of Bureau Veritas, STR and SGS. *Id.*

[48] *Id.* at p. 9.

[49] *Id.* at pp.10-11.

Approximately a week later, John Michnovitz, as executor of the Estate of Velma Michnovez, filed suit in the United States District Court for the District of New Hampshire.[50] His action was for the wrongful death of his mother on November 27, 2007, when her Robe came into contact with fire, ignited and burned.[51] He also brought an individual claim for the injuries he sustained in attempting to help her. The decedent's mother-in-law, who witnessed the incident, brought a claim for negligent infliction of emotional distress. The claims against Blair included negligent design, failure to warn, failure to inspect, failure to meet federal flammability standards and failure to recall the Robe

On July 20, 2010, Agnes Wise filed a complaint against Blair in the United States District Court for the Southern District of Illinois, for second degree burns she sustained on December 18, 2008, when her Robe caught fire upon being exposed to a burning candle.[52] The claims were for strict liability, design defect and negligence.[53] Ms. Wise alleged that the robe was "designed in such a fashion that it possessed an unreasonably high propensity to combust . . . [or] it lacked sufficient

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[50] *See* Schnick Dep. at Ex. 29. Defendants included A-One and Bureau Veritas entities. *Id.*

[51] *Id.* at p. 2 of 14.

[52] *See* Schnick Dep. at Ex. 22.

[53] *Id.* Valley Forge defended and indemnified Blair under the Valley Forge Policy, and settled all claims asserted against Blair LLC in the *Wise* action for $250,000. *See id.* at 143:2-3.

flame-retardant qualities."[54] The injury occurred in Breese, Illinois.[55]

Finally, Mary Jo Chitsey allegedly sustained third degree burns in Travis County, Texas, when, on January 1, 2009, her Robe came in close proximity to a lit gas stove and caught fire. Both Ms. Chitsey and her son, Ron Chitsey, who also sustained injuries, filed suit against Blair and Orchard on December 28, 2010, in the District Court of Travis County, Texas for negligence, gross negligence and for violation of the Flammable Fabrics Act, the Texas Uniform Commercial Code and the Texas Deceptive Trade Practices Act.[56]

In addition to these formal complaints, two Robe claims were identified by Blair's 30(b)(6) designee for which Valley Forge made indemnity payments on behalf of Blair in settlement of the claims prior to the initiation of litigation.[57] Karen K. Person, executrix of the Estate of Elaine E. Person, informed Blair that Elaine Person had died as a result of wearing a Blair Robe that caught fire while she was making

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[54] *Id.* at Ex. 22, p. 2.

[55] *Id.*

[56] *See* Schnick Dep. at Ex. 30. The claims of negligence included "distributing and selling the defective raised cotton fiber robe . . . that did not meet standards created to protect the public against risk of burn injuries," "[i]n designing a raised cotton fiber Chenille robe with open, wide and flowing sleeves which allowed the sleeves greater opportunity to graze an open flame," and for failing to warn of the product's dangerousness. *Id.* at p. 6.

[57] *See* Schnick Dep. at 139:25-143:3, Ex. 35; 165:25-169:4, Exs. 42-43.

breakfast over a gas stove on December 9, 2008.[58] On January 19, 2010, Neil Kaus, as trustee for the heirs of Darlene Kaus, notified Blair of the alleged wrongful death of Darlene Kaus who was wearing a Blair Robe on April 7, 2009, that caught fire when exposed to an electric stove in her home in Mankato, Minnesota.[59]

On December 21, 2009, Blair moved to have four Robe Claims pending in federal court consolidated for pre-trial purposes in the Middle District of Alabama pursuant to 28 U.S.C. § 1407. The motion was denied on April 5, 2010:

> Given that these are relatively straightforward personal injury or wrongful death actions and that the litigation will focus to a large extent on individual issues of fact concerning the circumstances of each consumer's injuries, the proponents of centralization have failed to convince [the Court] that any common questions of fact among these four actions are sufficiently complex and/or numerous to justify Section 1407 transfer at this time.[60]

The court noted that alternatives to transfer would suffice if duplicative discovery and/or inconsistent pretrial rulings surfaced.[61] It does not appear that the court, when considering the consolidation of only four cases with little complexity of issues, was

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[58] *See id.* at 165:25-169:4, Ex. 42. On or about May 11, 2010, Valley Forge settled the *Person* claim on Blair and Orchard's behalf for a payment of $250,000. *See id.* at 167:20-23.

[59] *See id.* at 139:25-143:3, Ex. 43. On or about September 29, 2010, Valley Forge defended and settled the *Kaus* claim on Blair's behalf for $410,000. *See id.* at 169:2-4.

[60] *In Re: Blair Corp. Chenille Robe Prod. Liab. Litig.*, MDL No. 2142 (J.P.M.L. Apr. 5, 2010).

[61] *Id.*

required to reach the question of whether the various Robe Claims were sufficiently similar, either factually or legally, to justify consolidation.[62]

III.

There is no dispute that Blair's policies are occurrence-based policies, not claims-made policies. "The use of the former instead of the latter signifies that neither [Blair] nor [its insurers] intended to base coverage on individual accidents that gave rise to claims."[63] "Rather, they intended to base coverage on the underlying circumstances (or occurrences) that resulted in the claims for damages."[64] The parties agree that the central issue in this case is whether the Robe Claims constitute a single occurrence or multiple occurrences under the Valley Forge Policy. State courts take different approaches when determining the number of "occurrences" under a general liability policy for the purpose of setting the scope of coverage. The parties have identified three states with a relationship to this dispute and, therefore, three state laws that may be applicable here: Pennsylvania (the situs of Blair's headquarters and operations); Massachusetts (the situs of Blair's parent companies, Orchard and Catalog); and Delaware (the forum and state of incorporation of Blair and Orchard).

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[62] *Id.*

[63] *Stonewall Ins. Co. v. E.I. duPont de Nemours & Co.*, 996 A.2d 1254, 1258 (Del. 2010).

[64] *Id.*

According to Valley Forge, the laws of Pennsylvania, Massachusetts and Delaware do not conflict with regard to the proper means by which to determine the number of occurrences involved in a claim for coverage. Accordingly, based on well settled conflict of laws principles, Valley Forge argues that the law of Delaware, as the forum state, should govern the analysis. Valley Forge goes on to explain that Delaware courts employ the "cause" test, which looks to the cause of the alleged injury and the conduct of the insured, when determining whether a single occurrence or multiple occurrences give rise to a claim for coverage. And, according to Valley Forge, "[b]ecause there is no dispute that Blair's decision to sell garments manufactured with allegedly flammable chenille cotton is the cause of [the] burn injuries and fatalities to Blair's customers, there is only one occurrence under the Valley Forge Policy."[65] Consequently, the $1 million per occurrence limit of the Valley Forge Policy applies and National Union must undertake to indemnify and defend Blair and Orchard after Valley Forge exhausts its $1 million in coverage.

In response, National Union argues that Massachusetts law on the proper interpretation of occurrence-based policies is materially different from Delaware law and that the Court must, therefore, engage in a complete conflict of laws analysis.

[65] Plaintiff Valley Forge Insurance Company's Opening Brief in Support of its Motion for Summary Judgment, D.I. 40042888 (Sept. 27, 2011) (hereinafter "Valley Forge Op. Br.") at 2.

According to National Union, this analysis points to Massachusetts, on balance, as the state with the most significant relationship to the parties and this dispute. National Union contends that Massachusetts recognizes a more nuanced "cause" test, or "cause-plus" test, in which the court must consider the unique facts and circumstances of each case when determining the number of occurrences at the heart of the claim for coverage.[66] National Union argues that, under Massachusetts law, the Robe Claims present "a number of discrete injuries, of varying severity, arising from unique circumstances widely separated in time and space. . . . occur[ing] to different individuals, in different locations, under different circumstances, giving rise to different claims asserted under different states' law,"[67] all constituting separate occurrences. Thus, Valley Forge continues to have defense and indemnity obligations until it has paid settlements and judgments on each separate Robe Claim up to the full $2 million aggregate limit of its policy.

IV.

Summary judgment shall be granted when there is no genuine issue as to any

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[66] Defendant National Union Fire Insurance Company of Pittsburgh, PA's Opening Brief in Support of its Motion for Summary Judgment, D.I. 40053966 (Sept. 27, 2011) (hereinafter "Nat'l Union Op. Br.") at 18. National Union contends that Massachusetts courts, uniquely, consider factors of temporality and geographical distance between injuries sustained when considering the number of occurrences. *Id.* at 19.

[67] Nat'l Union Op. Br. at 23.

material fact and the moving party is entitled to judgment as a matter of law.[68] When no factual dispute remains, summary judgment is particularly appropriate in matters of insurance contract interpretation because interpretation of an insurance policy is a question of law for the court.[69] National Union and Valley Forge have filed cross motions for summary judgment and agree that no genuine issues remain as to any material fact.[70] Accordingly, under Rule 56(h), the Court "shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[71] In this procedural posture, the usual standard of drawing inferences in favor of the nonmoving party does not apply.[72]

Valley Forge's request for declaratory relief is governed by Delaware's

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[68] Del. Super. Ct. Civ. R. 56(c).

[69] *See Stonewall*, 996 A.2d at 1258-59. *See also Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992) (explaining that summary judgment is appropriate when no material factual disputes exist).

[70] Nat'l Union Op. Br. at 14; Valley Forge Op. Br. at 11. The facts "contested" by Valley Forge in its opposition to Nat'l Union's motion for summary judgment do not create any material factual disputes and during oral argument Valley Forge agreed to judgment based on the stipulated facts in the record. *See* Hearing Tr. at 5, 17-18.

[71] Del. Super. Ct. Civ. R. 56(h). *See, e.g.*, *Am. Legacy Found. v. Lorillard Tobacco Co.*, 886 A.2d 1, 18 (Del. Ch. 2005), *aff'd*, 903 A.2d 728 (Del. 2006) ("[S]ince neither party argues that there is a disputed material issue of fact, the court deems the cross-motions to be the equivalent of a stipulation for decision on the merits on the record submitted.").

[72] *Lorillard Tobacco Co.*, 886 A.2d at 18.

Declaratory Judgment Act.[73] The Act provides that "[a]ny person interested under a . . . written contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status or other legal relations thereunder."[74] Four additional elements must be satisfied to justify declaratory relief: (1) the controversy must involve a claim of right or other legal interest of the party seeking the declaratory judgment; (2) the claim of right or other legal interest must be asserted against one who has an interest in contesting the claim; (3) the conflicting interests must be real and adverse; and (4) the issue must be ripe for judicial determination.[75] In a declaratory judgment proceeding, the plaintiff usually bears the burden of establishing entitlement to the declaration sought.[76] In this case, Valley Forge bears the burden of showing that the Robe Claims constitute a single occurrence under its insurance policy and that its defense and indemnity obligations terminate after it exhausts the $1 million single occurrence limit.

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[73] 10 *Del. C.* § 6501, *et seq*.

[74] *Id.* at § 6502.

[75] *See Weiner v. Selective Way Ins. Co.*, 793 A.2d 434, 439 (Del. Super. 2002) (citing *Rollins Int'l., Inc. v. Int'l Hydronics, Corp.*, 303 A.2d 660, 662-63 (Del. 1937)).

[76] *See Rhone-Poulenc v. GAF Chemicals*, 1993 WL 125512, at *3 (Del. Ch. Apr. 8, 1993) (recognizing that while the burden of persuasion in a declaratory judgment action may be reversed in certain circumstances, the "better view is that a plaintiff . . . should always have the burden of going forward."). *See also Certain Underwriters at Lloyds, London v. Nat'l Installment Ins. Servs., Inc.*, 2007 WL 4554453, at *6 (Del. Ch. Dec. 21, 2007) (same).

V.

A. Choice of Law

The parties have identified the laws of three states that may be applicable to this insurance coverage dispute and National Union argues that they are in conflict. When examining conflict of laws issues, Delaware courts adhere to the Restatement (Second) of Conflicts and generally apply the law of the state with the most significant relationship to the parties and the occurrence giving rise to the suit.[77] Before embarking on a full-blown conflicts analysis, however, Delaware courts first "compare the laws of the competing jurisdictions to determine whether the laws actually conflict."[78] A "true conflict" exists if the laws of the competing jurisdictions produce different results when applied to the facts of the case.[79] If so, the court must then conduct a choice of law analysis.[80] If not, then "there is no real conflict and a choice of law analysis would be superfluous."[81]

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[77] *See Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 WL 338219, at *8 (Del. Ch. Jan. 29, 2010); RESTATEMENT (SECOND) OF CONFLICTS §§ 188, 193. *See also Liggett Group Inc. v. Affiliated FM Ins. Co.*, 788 A.2d 134, 137 (Del. Super. 2001).

[78] *Mills LP v. Liberty Mut. Ins. Co.*, 2010 WL 8250837, at *4 (Del. Super. 2010) (quoting *Penn. Employee, Benefit Trust Fund v. Zeneca, Inc.*, 710 F. Supp. 2d 458, 466 (D. Del. 2010)).

[79] *Id.* (citing *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 46-47 (Del.1991)).

[80] *Id.*

[81] *Great Am. Opportunities*, 2010 WL 338219, at *8. *See also Kronenberg v. Katz*, 2004 WL (continued...)

Although the parties have identified three state laws that might be in play here, they have narrowed the potential conflict in law down to two - - Delaware and Massachusetts. Accordingly, the Court will consider the laws of both jurisdictions to determine first if there is a conflict and, if so, which state's law should be applied to resolve this coverage dispute.

1. Delaware Law

Under Delaware law, courts apply what has come to be known as the "cause" test when interpreting the definition of "occurrence" in occurrence-based insurance policies.[82] This test defines an occurrence with reference to the underlying cause(s) of the resulting injury.[83] The cause test poses the question "whether there is one proximate, uninterrupted, and continuing cause which resulted in all of the damage."[84]

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[81](...continued)
5366649, at *16 (Del. Ch. May 19, 2004) ("Where the choice of law would not influence the outcome, the court may avoid making a choice."); *ABB Flakt, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A.*, 1998 WL 437137, at *5 (Del. Super. June 10, 1998) ("When a choice of law analysis does not impact the outcome of the court's decision, no choice of law analysis need be made."), *aff'd*, 731 A.2d 811 (Del. 1999). *See also Penn. Employee, Benefit Trust Fund v. Zeneca, Inc.*, 710 F. Supp. 2d at 477 (referring interchangeably to the law of the forum state and other relevant state laws with no conflict) (citing cases).

[82] *E.I. du Pont de Nemours & Co. v. Admiral*, 1996 WL 190764, *3 (Del. Super. Apr. 9, 1996) ("Generally, an occurrence is determined by the cause or causes of the resulting injury."); *Stonewall*, 996 A.2d at 1257 (same) (citing *Admiral*).

[83] *Stonewall*, 996 A.2d at 1257 (citing *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 61 (3d Cir. 1982)).

[84] *Admiral*, 1996 WL 190764, at *3.

In this regard, "a single event, process or condition [that] results in injuries" will be deemed "a single occurrence even though the injuries may be widespread in both time and place and may affect a multitude of individuals."[85]

Delaware courts recognize that the cause of the resulting injury must be determined by reference to different factors depending on the factual circumstances of the underlying claim(s).[86] In the case of a multi-car accident, for example, this Court considered whether the driver should have been able to regain control of his vehicle at any point after the first impact but prior to subsequent impacts, which would suggest the existence of multiple occurrences, by analyzing the length of time that elapsed over the course of the event and the distance between the vehicles.[87] In contrast, the Supreme Court of Delaware, in *Stonewall Insurance Co. v. E.I. duPont*

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[85] *Id. See also Stonewall*, 996 A.2d at 1257; LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 172:12 (3d ed. 2005) ("[T]he number of acts producing injury or damage, rather than the number of injuries caused, is the key on which the definition of 'occurrence' turns in interpreting a 'per occurrence' clause; . . . a single act will constitute a single occurrence even though it causes multiple injuries or multiple episodes of injury.").

[86] *See, e.g.*, *Admiral*, 1996 WL 190764, at *4 (differentiating the causation analysis in car accidents and environmental cases); *Shreckengast v. State Farm Fire & Cas. Co.*, 1998 WL 731566, at *3 (Del. Super. May 18, 1998) (differentiating the causation analysis in products liability suits, car accidents and falling trees).

[87] *See, e.g.*, *McCoy v. Draine*, 1991 WL 18071, at *2-3 (Del. Super. Feb. 1, 1991) (mentioning a similar analysis in *Ennis v. Reed*, 467 C.A. 1977, Taylor, J. (Del. Super. Apr. 4, 1978) (Letter Opinion)).

de Nemours & Co.,[88] recognized that in a products liability case the proper focus is on the insured's "production and dispersal [of the product] - - not [necessarily] on the location of injury or the specific means by which injury occurred."[89] In *Stonewall*, DuPont faced 469,000 products liability claims for defective products that caused leaks in plumbing systems all over the United States.[90] The Supreme Court upheld the trial court's conclusion that those claims constituted a single occurrence because the cause of the injuries was "DuPont's production [and dispersal] of an unsuitable product."[91] The Court found it unnecessary to focus on the location of each injury or the specific means by which each injury occurred.[92] Furthermore, the Court noted that even though there were two different conditions that allegedly caused the product to be defective, it was ultimately the product itself, and not some other cause, that was the source of the resultant injuries.[93]

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[88] 996 A.2d 1254 (Del. 2010).

[89] *Stonewall*, 996 A.2d at 1258 (citing *Admiral*, 1996 WL 190764, at *3). Delaware courts have recognized that analogizing products liability cases to car accident cases "would be strained at best." *Admiral*, 1996 WL 190764, at *4; *Shreckengast*, 1998 WL 731566, at *3.

[90] *Stonewall*, 996 A.2d at 1255.

[91] *Id.* at 1258.

[92] *Id.*

[93] *Id.* at 1257 (recognizing that the insured's production and dispersal of the defective product was the relevant conduct that subsequently caused the injuries alleged).

2. Massachusetts Law

Massachusetts courts also apply a "cause" test when determining the number of occurrences for purposes of insurance coverage. In doing so, they "look to the 'cause' of the injury by reference to the conduct of the insured for which coverage is afforded."[94] The focus of the inquiry is whether a "single, ongoing cause" resulted in the alleged injuries.[95] Massachusetts courts have embraced "the possibility that multiple acts taking place over a space of time may contribute to a single occurrence for purposes of coverage."[96] And, like Delaware courts, Massachusetts courts recognize that certain factors may be of more significance than others in determining whether the cause of the injury presents one occurrence or multiple occurrences depending on the factual circumstances of the underlying claim.[97]

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[94] *RLI Ins. Co. v. Simon's Rock Early Coll.*, 765 N.E.2d 247, 251 (Mass. App. Ct. 2002). *See also Keyspan New Eng., LLC v. Hanover Ins. Co.*, 2008 WL 4308310, at *12 (Mass. Super. Aug. 14, 2008) (finding that contamination of a site by the insured arising from multiple discharges over time constituted a single occurrence); *Hernandez v. Scottsdale Ins. Co.*, 2009 WL 2603361, at *6 (Mass. Super. Aug. 6, 2009) (finding that the insured's inadequate hiring, supervision and security practices, that resulted in multiple killings by multiple shooters, constituted a single occurrence).

[95] *Worcester Ins. Co. v. Fells Acres Day Sch.*, 558 N.E.2d 958, 973 (Mass. 1990) (noting that the analysis includes looking for a "single, ongoing cause" of the injuries).

[96] *Simon's Rock*, 765 N.E.2d at 253.

[97] *Compare Colonial Gas Co. v. Aetna Cas. & Sur. Co.*, 823 F. Supp. 975, 983 (D. Mass. May 21, 1993) (focusing on the insured's production of a defective product to determine the "cause" of injury), *Simon's Rock*, 765 N.E.2d at 254 (focusing on the insured's failure to provide appropriate security and student supervision), *Fells Acres*, 558 N.E.2d at 973 (focusing on the number of discrete acts of abuse and negligence that occurred over time by different defendants in different locations), (continued...)

In products liability cases, the analysis for determining the underlying cause of injuries requires careful consideration of the insured's production, distribution and/or use of the allegedly defective product. For example, in *Colonial Gas Co. v. Aetna Casualty & Surety Co.*, the United States District Court for the District of Massachusetts employed the Massachusetts "cause" test to determine whether "each installation of UFFI [urea-formaldehyde foam insulation] into a home would comprise a single occurrence, or whether [the insured's] entire 400 home UFFI program is a single occurrence."[98] The court found, "consistent with the rule in the majority of states, that the number of occurrences turns on the underlying cause of the property damage, and where, as here, there is a single cause–Colonial's use of UFFI in its insulation program–there is a single occurrence."[99] That same court subsequently applied the holding in *Colonial Gas* to a class action brought by consumers alleging that a company provided "'defective' and 'dangerous' products

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[97](...continued)
and Mass. Homeland Ins. Co. v. Walsh, 944 N.E.2d 1095, 1095 (Mass App. Ct. 2011) (focusing on the short spatial and temporal span in which one vehicle continuously and intentionally rammed into a second vehicle), ***with*** *Stonewall*, 996 A.2d at 1258 (focusing on the insured's production and dispersal of defective product to determine the "cause" of injury in a products liability case); *Shreckengast*, 1998 WL 731566, at *3 (focusing on the discrete act of a tree falling and not the time the tree took to rot); *McCoy*, 1991 WL 18071, at *2-3 (focusing on spatial and temporal factors of a multiple vehicle accident).

[98] *Colonial Gas Co.*, 823 F. Supp. at 983.

[99] *Id.*

that caused property damage and posed a risk of personal injury."[100] Under Massachusetts law, the court determined that "there was a single occurrence based on the fact that all of the claims share a single common cause, i.e., faulty design and construction in the [product] leading to leaks from the coil assembly."[101]

3. Delaware and Massachusetts Law Do Not Conflict

Having carefully considered the applicable law of Delaware and Massachusetts, the Court is satisfied that both states apply substantially the same "cause" test when determining the number of occurrences under an occurrence-based general liability insurance policy. In this regard, the Court rejects National Union's argument that *Fells Acres*, *Slater* and *Lappin* illustrate the point that Massachusetts

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[100] *Amtrol, Inc. v. Tudor Ins. Co.*, 2002 WL 31194863, at *2 (D. Mass. Sept. 10, 2002).

[101] *Id.* at *5. Outside of the products liability context, Massachusetts courts, like Delaware courts, consider notions of time and space, when necessary, to determine if multiple claims were caused by a single uninterrupted event or scheme or whether multiple causes were in play. *See, e.g.*, *Fells Acres*, 558 N.E.2d at 973 (considering the number of child abuse defendants in different locations as a factor precluding "the possibility that there was but a single, ongoing cause of the injuries alleged"); *Slater v. U.S. Fidelity and Guar. Co.*, 400 N.E.2d 1256, 1261-62 (Mass. 1980) (considering the fifteen month period over which a series of thefts by an employee occurred as a factor in determining the number of occurrences); *Chicago Ins. Co. v. Lappin*, 729 N.E.2d 1018, 1028 (Mass. App. Ct. 2003) (finding that the insured's negligence was comprised of "discrete, unrelated breaches occurring over many years resulting in discrete, unrelated losses to numerous individuals"); *Simon's Rock*, 765 N.E.2d at 254 (finding that the underlying cause of a student's shooting spree with multiple victims, spanning only a short time, was "an arguably inadequate policy of security and student supervision [by the college]" that constituted a single occurrence under the applicable liability policy); *Mass. Homeland Ins. Co. v. Walsh*, 944 N.E.2d at 1095 (finding one occurrence from a "single, continuous episode of ramming [. . . a] vehicle [into another vehicle] that occurred in a short spatial and temporal span"); *McCoy*, 1991 WL 18071, at *2-3 (considering time sequence and separation by distance when determining if multiple vehicle accidents constituted a single or multiple occurrences).

courts take a different, more nuanced approach to the cause test than the approach taken by Delaware courts. First, even a cursory review of these cases reveals that they present factual scenarios readily distinguishable from the products liability claims Blair and Orchard have presented for coverage here.[102] Second, none of these cases mention a "cause plus" test much less suggest that a more nuanced approach to the cause test was at work. To the contrary, the courts describe the cause test in a manner entirely consistent with Delaware case law and other Massachusetts decisions.[103] Simply stated, the courts of Delaware and Massachusetts both determine

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[102] In *Fells Acres* the court found that allegations of widespread child abuse at a day school, and related claims of negligence and breach of duty, against multiple defendants (all, but one, employees of the insured) constituted separate discrete acts that precluded "the possibility that there was but a 'single, ongoing cause' of the injuries alleged." 558 N.E.2d at 973. In *Slater*, the court, construing the policy language against the insurer, found that each act within a far-flung embezzlement scheme was a separate occurrence, as opposed to a single common scheme, because there was a separate intent to embezzle preceding each act. 400 N.E.2d at 1261. In *Lappin*, the court found that under a claims-based policy (and not an occurence-based policy), the insured's negligence was not a singular failure to supervise his embezzling employee, but multiple discrete and "unrelated breaches occurring over many years resulting in discrete, unrelated losses to numerous individuals." 729 N.E.2d at 1028. In distinguishing these cases, the Court notes that the decisions in *Fells Acres*, *Slater* and *Lappin* stem from underlying allegations of multiple discrete acts of intentional misconduct by the insured's employees. There are no allegations against Blair or its employees of multiple acts of intentional misconduct necessitating the same interpretation of "occurrence." The claims against Blair allege that the plaintiffs' injuries were caused by Blair's ongoing production and sale of the same defective Robes.

[103] *Compare Fells Acres*, 558 N.E.2d at 973 (considering whether there was one "single, ongoing cause" of the injuries alleged), *Slater*, 400 N.E.2d at 1256 (considering whether there was "one, uninterrupted proximate cause which result[ed] almost immediately in more than one impact or event"), *and Lappin*, 729 N.E.2d at 1028 (considering whether there was one continuous cause of the insured's underlying negligence or multiple discrete acts, with reference to temporal factors), ***with*** *Admiral*, 1996 WL 190764, at *4 (considering whether there was "one proximate, (continued...)

whether single or aggregate occurrence coverage limits are available by looking to the factual circumstances of the underlying claim, including spatial and temporal factors when necessary, as well as the conduct of the insured, in order to assess whether there was a single cause or multiple causes of the injury giving rise to the claim.

Because application of the laws of Massachusetts and Delaware would produce the same result with regard to Valley Forge's coverage obligations for the Robe Claims, no conflict of laws exists. Accordingly, the Court will not engage in a choice of law analysis but will apply Delaware law as the law of the forum state.[104]

B. The Robe Claims Constitute A Single Occurrence Under Delaware's "Cause" Test

As our Supreme Court has emphasized, the appropriate starting point when determining the scope of coverage under an occurrence-based policy is the policy itself.[105] "Occurrence" is defined within the Valley Forge Policy as an "accident, including continuous or repeated exposure to substantially the same harmful

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[103](...continued)
uninterrupted, and continuing cause which resulted in all of the damage").

[104] *See, e.g.*, *Penn. Employee, Benefit Trust Fund v. Zeneca, Inc.*, 710 F. Supp. 2d at 477 (referring interchangeably to the law of the forum state and other relevant state laws with no conflict) (citing cases). *See also* Hearing Tr. at 30-31 (counsel agreeing with the Court that Delaware law would apply if it was decided that Massachusetts law applied the same "cause" test as Delaware).

[105] *Stonewall*, 996 A.2d at 1257-58.

conditions."[106] When interpreting this definition, the Court will apply the "cause test" as adopted in Delaware.[107] In products liability cases, the proper focus is on the insured's production and dispersal of the defective product leading to the injuries alleged.[108]

In this case, the alleged burn injuries and deaths covered by the Valley Forge Policy all allegedly occurred when a 100% chenille Robe, spec'd and sold by Blair, made contact with either a candle, cigarette lighter or stove. Each claimant has

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[106] Compl. Ex. A, General Commercial Liability Form, Section V, Definitions ¶ 31, p. 12 of 14. The Court finds that the policy language is clear and unambiguous and will apply its ordinary and usual meaning. *Rhone-Poulenc*, 616 A.2d at 1195.

[107] *See Stonewall*, 996 A.2d at 1258 ("[G]enerally, an occurrence is determined by the cause or causes of the resulting injury."); *Admiral*, 1996 WL 190764, at *3-4 (same). The policies at issue in *Stonewall* and *Admiral* stated: "'Occurrence' . . . shall mean an accident or a happening or event or a continuous or repeated exposure to conditions . . . . All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence." *Stonewall*, 996 A.2d at 1257; *Admiral*, 1996 WL 190764, at *1. The first sentence of this definition is comparable to the definition of "occurrence" in the Valley Forge Policy, and National Union makes no effort to distinguish that portion of the *Stonewall/Admiral* "occurrence" definition. National Union does, however, contend that the presence of the additional so-called "deemer clause" regarding the "premises location"in the *Stonewall* and *Admiral* policies somehow distinguishes those cases from this case. Yet the "deemer clause" neither prompted the courts to utilize the "cause" test nor animated the manner in which they applied the test. Indeed, in *Stonewall*, the Court took great pains to demonstrate how the "deemer clause" was not *inconsistent* with its application of the cause test; it did not refer to the "deemer clause" as the basis for applying the cause test in the first instance. *Id.* at 1258. *See also Colonial Gas Co.*, 823 F. Supp. at 983 (finding one occurrence pursuant to the "cause" test without a "deemer clause" in the policy).

[108] *Stonewall*, 996 A.2d at 1258; *Admiral*, 1996 WL 190764, at *4. *See also Champion Int'l Corp. v. Cont'l Cas. Co.*, 546 F.2d 502, 506 (2d Cir. 1976), *cert. denied*, 434 U.S. 819 (1977) (holding that defective paneling sold was one occurrence because exposure during the sale and delivery process was continuous and repeated); *Owens-Illinois, Inc. v. Aetna Cas. and Sur. Co.*, 597 F. Supp. 1515, 1527-28 (D.D.C. 1984) (holding that the manufacture and sale of products containing asbestos was a single occurrence).

alleged that the Robe's poor design and/or inherent flammability, without appropriate warnings of its dangerousness, caused the plaintiff's or plaintiff's decedent's alleged burn injuries or deaths. Given the consistent factual and legal predicates of each of these claims, the Court is satisfied that the "cause" of the losses for which Blair and Orchard seek coverage is Blair's alleged negligence and/or strict liability in connection with the production and distribution of an unreasonably dangerous product.[109] This single "cause" constitutes a single "occurrence," *i.e.* "continuous or repeated exposure to substantially the same harmful conditions," under the Valley Forge Policy.[110]

The fact that the scientific cause of the Robe's alleged defect is still unknown - - whether it be from poor design or chenille's inherent flammability - - is of no

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[109] Every Blair Robe was manufactured by A-One at the same factory with 100% chenille fabric pursuant to the same design specifications provided by Blair. Schnick Dep. at 36:19-37:3; 43:22-44:23; 156:23-157:15; 169:5-21. Blair arranged quality inspections to be performed on the Robes so that they would meet customer acceptability and federal flammability standards. *Id*. at 68:4-71:23; 72:1-76:4; 77:6-13. The Robes were then shipped to Blair's Irvine distribution center where they were stored together until shipped to Blair's consumers. *Id*. at 60:10-61:11. Under Delaware law, such a "process" may be deemed a single occurrence even though the alleged injuries are widespread in time and geography. *Stonewall*, 996 A.2d at 1257.

[110] *See id.* at 1258 (applying the cause test to conclude that multiple claims arising from the same factual and legal predicate constituted a single occurrence for purposes of insurance coverage). The Court is satisfied that Blair had sufficient control over the manufacturing process - - including, but not limited to: control over the design, fabric used, inspections, modes of shipment and storage - - to find that Blair's role in the manufacture, sale and dispersal of the Robes is analogous to DuPont's role in the manufacture and distribution of the defective plumbing systems at issue in *Stonewall*.

consequence to the coverage determination because, for purposes of interpreting the "occurrence" clause of the Valley Forge Policy, the ultimate defect is the Robe itself, which Blair both produced and distributed.[111] In *Stonewall*, the Supreme Court considered an argument that the various claims were separate occurrences because DuPont's fault stemmed from "two separate and independent causes: chemical degradation *and* the product's inability to resist mechanical stresses."[112] The Court rejected this argument, holding:

> Whether the failure resulted from the product's susceptibility to chemical degradation from the inside of the pipe or from its inability to withstand mechanical stress from the outside, or both, the product itself was the source of the leaking polybutylene systems and the resultant property damage. . . . Whether it was one condition or two that made the product unsuitable for use . . . is of no legal significance.[113]

Similarly, the Robe itself was the alleged source of each claimant's injuries and the subsequent loss sustained by Blair and Orchard. The exact mechanism of causation or injury is "of no legal significance" when interpreting "occurrence" within the Valley Forge Policy.[114]

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[111] *See id.* at 1257.

[112] *Id.* (emphasis in original).

[113] *Id.*

[114] *Id.* As courts have recognized, the "cause of injury," when referenced in the context of insurance coverage, actually refers to the "cause or occurrence that gives rise to insurance coverage." *Simon's Rock*, 765 N.E.2d at 289. *See also id.* at 289-90 n.2 ("Confusion can arise when, as is often (continued...)

For this same reason, National Union misses the mark when it argues that the involvement of multiple defendants, different suppliers, inspectors, modes of transportation, and raw materials, as well as the number of lots or batches shipped to Blair from A-One, operate together to create multiple occurrences. Whether *vel non* all of these elements played a role in the production or distribution of the allegedly defective Robes does not alter the conclusion that through the continuous process of production and distribution into the stream-of-commerce, the Robes themselves emerge as the alleged cause of the injuries giving rise to Blair's and Orchard's liability for the Robes Claims.[115]

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[114](...continued)
the case in opinions discussing the issue, the language of tort liability is called upon to inform the language of insurance risk coverage. . . . [The Court cannot] "ignore[] the fact that the issue to be determined is not liability, but the contractual obligation of an insurer to an insured."); *Appalachian*, 676 F.2d at 1 (considering the cause of the loss sustained by the insured and finding "[t]he injuries for which [the insured] was liable all resulted from a common source").

[115] *See, e.g.*, *Stonewall*, 996 A.2d at 1258 (determining that in a products liability case the "cause" of the alleged injuries stemmed from the insured's production and dispersal of the product); *Admiral*, 1996 WL, at *4 (same). *See also Colonial Gas Co.*, 823 F. Supp. at 983 (determining that the underlying cause was the insured's use of a defective product). National Union has suggested that the decision of the United States Judicial Panel on Multidistrict Litigation (the "MDL court") denying Blair's motion to consolidate supports its argument that the Robes Claims constitute multiple occurrences. *See, e.g.*, Hearing Tr. at 38:4-10. The MDL court decided not to consolidate four of the Robe Claims because "the proponents of centralization . . . failed to convince [the Court] that any common questions of fact . . . are sufficiently complex and/or numerous to justify Section 1407 transfer at this time." *In Re: Blair Corp. Chenille Robe Prod. Liab. Litig.*, MDL No. 2142 (J.P.M.L. Apr. 5, 2010). In coming to that determination, the MDL court had to consider whether transfer would be "for the convenience of parties and witnesses" and would "promote the just and efficient conduct of such actions." 28 U.S.C. § 1407. In contrast, this Court must focus on the cause of the Robe claims in light of the expectations of the parties entering into the insurance contract. The (continued...)

At oral argument, National Union clarified that, pursuant to its interpretation of Delaware and Massachusetts law, the only scenario in which the Court could find a single occurrence under the Valley Forge Policy is one where all of the Robes had been shipped from one lot or batch.[116] In that situation, the Robes would have been created from the same raw material, inspected by the same inspectors, and shipped by the same mode of transportation. They also would have entered the United States through the same point of entry and arrived at Blair at the same time. Such a narrow reading of "occurrence" is incompatible with a proper application of the cause test in products liability cases as recognized in Delaware and elsewhere.[117] Moreover, there was no "batch" or "lot" clause included in the Valley Forge Policy that would justify

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[115](...continued)
analyses are entirely different.

[116] Hearing Tr. at 47.

[117] *See, e.g.*, *Stonewall*, 996 A.2d at 1255, 1258 (finding a single occurrence stemming from the insured's production and dispersal of a defective product despite the fact that the product was manufactured from 1983 through 1989, in presumably more than one production run); *Uniroyal*, 707 F. Supp. at 1384-85 (finding continuous shipments over a period of months were part of a routinized, repetitive process that constituted a single continuous occurrence) (citing *Am. Univ. Ins. Co. v. McCloskey Varnish Co.*, slip op., No. 83-5161 (E.D. Pa. Mar. 19, 1985) (finding that supplying a distributor with a defective product was a single occurrence, while rejecting the argument that each shipment or each ultimate injury was a separate occurrence)); *Household Mfg, Inc. v. Liberty Mut. Ins. Co.*, slip op., No. 85-C-8519 (N.D. Ill. Feb. 10, 1987) (applying New York law, numerous shipments on a mass basis were found to be continuous and repeated exposure to the same conditions); *Cargill, Inc. v. Liberty Mut. Ins. Co.*, 488 F. Supp. 49, 53 (D. Minn. 1979), *aff'd*, 621 F.2d 275 (8th Cir. 1980) (finding that production of defective medium for growing antibiotics was one occurrence "even though numerous production 'batches' of erythromycin were affected"). The Court notes that not all of the cases cited were analyzed under the "cause" test, but all included policy terms and fact patterns analogous to Blair's.

such a narrow focus on the distribution of each "lot" of Robes when determining the number of occurrences.[118]

The Court likewise rejects National Union's argument that the Court should follow *Evanston Insurance Co. v. Ghillie Suits.com, Inc.*,[119] a case interpreting California law under purportedly similar facts, where the court found multiple occurrences triggered the insurer's aggregate coverage. There, the court held that, for purposes of determining the number of occurrences, "there should be a close temporal relationship between the occurrence and the injury."[120] This narrow view of the cause test prompted the court to look only to the immediate and proximate cause of each injury giving rise to the claim for coverage.[121] Thus, the court found that when two marine officers caught fire during a training exercise while wearing ghillie suits

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[118] *See generally* Compl. ¶ 12, Ex. A (containing no "batch" or "lot" clause). "Batch" or "lot" clauses in product liability cases generally include language similar to the "Lot or Batch Provision" examined in *ConAgra Foods, Inc. v. Lexington Ins. Co.* 21 A.3d 62, 72 (Del. Supr. 2011). The relevant language stated: "all Bodily Injury or Property Damage arising out of one lot or batch of products prepared or acquired by you [the insured], shall be considered one Occurrence." *Id.* at 65. "Lot or Batch" was defined as "a single production run at a single facility not to exceed a 7 day period." *Id. See also Diamond Shamrock Chem. Co. v. Aetna Cas. & Sur. Co.*, 609 A.2d 440, 479 (N.J. Super. 1992) (interpreting the insured's "batch clause": "All such damage arising out of one lot of goods or products prepared or acquired by the named insured or by another trading under his name shall be considered as arising out of one occurrence.").

[119] 2009 WL 734691, at *10 (D.N.D. Cal. Mar. 19, 2009).

[120] *Id.*

[121] *Id.*

manufactured by the same company, the events were two separate occurrences because the proximate cause of one marine's injuries was the ignition of his ghillie suit while the proximate cause of the other marine's injuries was his decision to help the first marine which, in turn, caused his suit to catch fire.[122] The court stated: "Once the analysis looks behind the immediate and proximate cause of an injury, any number of preceding events could be said to be the underlying cause of a person's injuries."[123]

The analysis laid out in *Ghillie Suits* is inconsistent with both the Delaware and Massachusetts cause tests. To reiterate, when applying the cause test in products liability cases, Delaware and Massachusetts courts look to the cause of the claimed injuries with a focus on the insured's conduct in the production and distribution of the allegedly defective product.[124] It is true that each claimant's decision to have contact with a Blair Robe, whether already ignited (as in the case of those who attempted to render assistance to the person wearing the Robe) or not, was a proximate cause of his or her burn injuries. But those contacts, in isolation, do not

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[122] *Id.* at *11.

[123] *Id.*

[124] *See, e.g.*, *Stonewall*, 996 A.2d at 1258 (focusing on the insured's conduct to determine the cause of the injuries for which the insured was liable); *Simon's Rock*, 765 N.E.2d at 251 ("[W]e must look to the 'cause' of the injury by reference to the conduct of the insured for which coverage is afforded . . . .").

expose the insured to liability. It is the allegedly defective Robe itself, produced and distributed by Blair and Orchard, that is at the heart of each of the Robes Claims and serves as the cause of the losses for which Blair and Orchard seek coverage under the Valley Forge Policy. To conclude otherwise would be to convert, without any basis, Valley Forge's occurrence-based policy into a claims-made policy.[125]

C. Valley Forge Is Obligated to Defend and Indemnify Blair and Orchard Up To The One Million Dollar Per Occurrence Policy Limit

Valley Forge has met its burden of establishing that the Robe Claims constitute a single occurrence under its policy. Accordingly, Valley Forge is entitled to a declaration that it is responsible for the defense and indemnity of Blair and Orchard with regards to the Robe Claims up to the $1 million per occurrence policy limit (as opposed to the $2,000,000 aggregate policy limit).[126] Once Valley Forge has

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[125] *See Stonewall*, 996 A.2d at 1258 (mentioning that the policies at issue were by "definition and choice" occurrence-based and as a result, the parties did not intend to "base coverage on individual accidents that gave rise to claims").

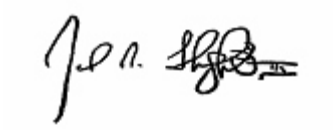
[126] The Court will not entertain Fireman's Fund's argument that the declaratory judgment action is not justiciable against it because the argument has not been properly presented to the Court. *See* Fireman's Fund Resp. Fireman's Fund never filed a cross-claim for a declaratory judgment of no coverage, nor did it file a motion to dismiss or even a cross-motion for summary judgment on the issue of justiciability. Moreover, the record reflects that Valley Forge has previously expended at least $910,000 in defense of the Robe Claims and still faces at least seven pending claims, including one where Valley Forge purports the settlement demand to be $10,000,000. *See* Compl. ¶¶ 20, 23; Schnick Dep. at 143:2-3; 167:20-23; 169:2-4, Ex. 35. *See also supra* pp. 9-14 (summarizing each of the Robes claims provided to the Court). There is at least a reasonable possibility that the Fireman's Fund Policy might be implicated. *See North Am. Philips Corp. v. Aetna Cas. and Sur.* (continued...)

exhausted the $1 million per occurrence limit in defense and indemnity obligations under its policy, Valley Forge will have no further coverage obligations with respect to the Robe Claims.

VI.

Based on the foregoing, Plaintiff Valley Forge's motion for summary judgment is **GRANTED** and Defendants National Union and Fireman's Fund's motions for summary judgment are **DENIED**.

IT IS SO ORDERED.



Joseph R. Slights, III, Judge

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[126](...continued)
Co., 565 A.2d 956, 961 (Del. Super. 1989) ("[A]bsolute proof that the Excess Carriers policies will be triggered is by no means required by this Court before jurisdiction under the Declaratory Judgment Act exists.").