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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

STATE FARM FIRE AND CASUALTY )  
COMPANY, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
ARBOR VINEYARDS HOMEOWNERS )  
ASSOCIATION, an Oregon )  
corporation; ARBOR VINEYARDS, )  
LLC, an Oregon limited liabil- )  
ity company, formerly known as )  
ARBOR OAKS, LLC; WEST HILLS )  
DEVELOPMENT COMPANY, INC., an )  
Oregon corporation; WALTER E. )  
REMMERS, an individual; and )  
DENNIS E. SACKOFF, an )  
individual, )  
 )  
Defendants. )  
\_\_\_\_\_ )

No. CV-10-504-HU

OPINION & ORDER

Diane L. Polscer  
Brian C. Hickman  
GORDON & POLSCER, L.L.C.  
Suite 650  
9755 S.W. Barnes Road  
Portland, Oregon 97225

Attorneys for Plaintiff

/ / /

1 - OPINION & ORDER

1 Daniel E. Zimberoff  
Kathleen A. Profitt  
2 BARKER MARTIN, P.S.  
319 S.W. Washington Street  
3 Suite 420  
Portland, Oregon 97204-2635

4 Attorneys for Defendant Arbor Vineyards Homeowners Ass'n

5 Michael E. Farnell  
6 James L. Guse  
PARSONS FARNELL & GREIN, LLP  
7 1030 S.W. Morrison Street  
Portland, Oregon 97205

8 Attorneys for Defendants Arbor Vineyards, LLC, West Hills  
9 Development Company, Remmers, and Sackoff

10 HUBEL, Magistrate Judge:

11 Plaintiff State Farm Fire and Casualty Company brings this  
12 declaratory judgment action against defendants Arbor Vineyards  
13 Homeowners Association (HOA), Arbor Vineyards, LLC, West Hills  
14 Development Company, Inc., Walter Remmers, and Dennis Sackoff (the  
15 Arbor LLC defendants). The action concerns plaintiff's duty to  
16 indemnify defendants pursuant to an insurance policy, in a pending  
17 state court case.

18 All defendants move to abate the action.<sup>1</sup> Plaintiff also  
19 moves to dismiss two counterclaims brought against it by the Arbor  
20 LLC defendants. All parties have consented to entry of final  
21 judgment by a Magistrate Judge in accordance with Federal Rule of  
22 Civil Procedure 73 and 28 U.S.C. § 636(c). I grant the motion to  
23 abate and the motion to dismiss.

24 BACKGROUND

25 The HOA and the Arbor LLC defendants are litigants in a

26 \_\_\_\_\_  
27 <sup>1</sup> The motion was filed by the Arbor LLC defendants. In a  
28 separate September 24, 2010 filing, the HOA joined the motion to  
abate (docket #31).

1 pending lawsuit in Washington County. The HOA filed an Amended  
2 Complaint in that action on January 19, 2010. In the instant case,  
3 plaintiff alleges that the underlying lawsuit involves claims by  
4 the HOA for alleged misconduct in the building, selling, and  
5 managing, prior to turnover, of 101 common wall residential units  
6 ("the Townhouses"), located in the Arbor Vineyards Planned Unit  
7 Development.<sup>2</sup>

8 In the Complaint in this case, plaintiff states that it has  
9 accepted the tender of defense of the underlying action from the  
10 Arbor LLC defendants and is currently participating in the defense  
11 subject to a reservation of rights.<sup>3</sup> But, plaintiff alleges, a  
12 dispute exists between plaintiff and the Arbor LLC defendants  
13 concerning the scope and extent of plaintiff's duty to indemnify  
14 the potential insureds under the policy plaintiff issued to the HOA  
15 for the period July 23, 2003, through July 23, 2010.

16 Plaintiff alleges that subject to its reservation of the right  
17 to assert additional coverage defenses following resolution of the  
18 underlying lawsuit, it "limits its request for declaratory relief  
19 to issues that can be decided as a matter of law by reference only  
20 to the Policy, the Underlying Complaint and undisputed facts."  
21 Compl. at ¶ 18. Plaintiff seeks six "legal declarations regarding  
22 its potential indemnity obligations to the potential insureds."  
23 Id. at ¶ 19.

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25  
26 <sup>2</sup> A copy of the underlying complaint is attached as Exhibit  
27 2 to the Complaint in this case.

28 <sup>3</sup> A copy of the insurance policy is attached as Exhibit 1  
to the Complaint.



1 whether the use of a declaratory action will result in entanglement  
2 between the federal and state court systems; (5) the convenience of  
3 the parties; and (6) the availability and relative convenience of  
4 other remedies. Id. at 1225 n.5.

5 While the presence of "parallel state proceedings involving  
6 the same issues and parties pending at the time the federal  
7 declaratory action is filed" results in a "presumption that the  
8 entire suit should be heard in state court[,] "there is no  
9 presumption in favor of abstention in declaratory actions  
10 generally, nor in insurance coverage cases specifically." Id. at  
11 1225. "The pendency of a state court action does not, of itself,  
12 require a district court to refuse federal declaratory relief."  
13 Id. Accordingly, nothing prevents an insurer "from invoking  
14 diversity jurisdiction to bring a declaratory judgment action  
15 against an insured on an issue of coverage." Id.

## 16 II. Motion to Dismiss

17 On a motion to dismiss, the court must review the sufficiency  
18 of the complaint. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).  
19 All allegations of material fact are taken as true and construed in  
20 the light most favorable to the nonmoving party. American Family  
21 Ass'n, Inc. v. City & County of San Francisco, 277 F.3d 1114, 1120  
22 (9th Cir. 2002). However, the court need not accept conclusory  
23 allegations as truthful. Holden v Hagopian, 978 F.2d 1115, 1121  
24 (9th Cir. 1992).

25 A motion to dismiss under Rule 12(b)(6) will be granted if  
26 plaintiff alleges the "grounds" of his "entitlement to relief" with  
27 nothing "more than labels and conclusions, and a formulaic  
28 recitation of the elements of a cause of action[.]" Bell Atlantic

1 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotation  
2 omitted). "Factual allegations must be enough to raise a right to  
3 relief above the speculative level, . . . on the assumption that  
4 all the allegations in the complaint are true (even if doubtful in  
5 fact)[.]" Id. (citations and footnote omitted).

6 To survive a motion to dismiss, the complaint "must contain  
7 sufficient factual matter, accepted as true, to state a claim to  
8 relief that is plausible on its face[.]" meaning "when the  
9 plaintiff pleads factual content that allows the court to draw the  
10 reasonable inference that the defendant is liable for the  
11 misconduct alleged." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949  
12 (2009) (internal quotation omitted). Additionally, "only a  
13 complaint that states a plausible claim for relief survives a  
14 motion to dismiss." Id. at 1950. The complaint must contain  
15 "well-pleaded facts" which "permit the court to infer more than the  
16 mere possibility of misconduct." Id.

## 17 DISCUSSION

### 18 I. Declaratory Judgment Act

19 The Ninth Circuit has "consistently held that a dispute  
20 between an insurer and its insureds over the duties imposed by an  
21 insurance contract satisfies Article III's case and controversy  
22 requirement." Dizol, 133 F.3d at 1222 n.2. A case or controversy  
23 is found when an insurer brings a declaratory judgment action  
24 regarding its duty to defend and indemnify. See, e.g., American  
25 States Ins. Co. v. Kearns, 15 F.3d 142, 144 (9th Cir. 1994). Such  
26 is the case here.

27 Statutory jurisdictional requirements are also met because  
28 there is complete diversity between the parties and the amount in

1 controversy is more than \$75,000. Thus, statutory jurisdiction is  
2 proper under 28 U.S.C. § 1332(a). As to the Brillhart factors, on  
3 balance, I find that entertaining the action is appropriate.

4 II. Motion to Abate

5 In a 2001 Findings & Recommendation, subsequently adopted by  
6 Judge Haggerty, I discussed at some length the relevant analysis  
7 under Oregon law for resolving motions to stay an action by an  
8 insurer seeking declarations about its duty to defend and/or  
9 indemnify a potential insured in an underlying action. The Home  
10 Indemnity Co. v. Stimson Lumber Co., 229 F. Supp. 2d 1075, 1087-88  
11 (D. Or. 2001). I concluded that a fair reading of North Pacific  
12 Insurance Co. v. Wilson's Distributing Service, Inc., 138 Or. App.  
13 166, 908 P.2d 827 (1995), the relevant Oregon case on the issue,  
14 indicated that there were two required questions in the stay  
15 analysis:

16 (1) whether the insurer could develop facts in a  
17 declaratory judgment action, commenced before the  
18 underlying tort action is concluded, that would negate  
19 the insurer's duty to defend; and (2) does the  
20 declaratory judgment action force an insured to  
prematurely litigate the insured's potential liability in  
underlying tort claims and require the insured to take  
inconsistent positions?

21 The Home, 229 F. Supp. 2d at 1088.

22 In support of the motion to abate, the Arbor LLC defendants  
23 argue that as in Wilson's Distributing, this matter should be  
24 abated pending resolution of the underlying case because it is  
25 clear that the Arbor LLC defendants will be placed in an untenable,  
26 conflicted position if forced to respond substantively to  
27 plaintiff's claims. Plaintiff acknowledges the controlling law,  
28 but notes that a concurrent coverage action is barred only if it

1 would force the insured to abandon its denial of liability in the  
2 underlying lawsuit or to produce evidence tending to establish such  
3 liability. See American States Ins. Co. v. Dastar Corp., 318 F.3d  
4 881, 890-91 (9th Cir. 2003) (noting that the Wilson's  
5 Distributing court held that a trial court should stay a  
6 determination of the duty to indemnify prior to the resolution of  
7 the underlying case when an insurer attempts to place the insured  
8 in the conflicted position of being required to abandon its denial  
9 of liability in order to obtain coverage).

10 Plaintiff argues that because it seeks legal rulings only, and  
11 does not seek any factual determinations, its request for  
12 declaratory relief is expressly limited to avoid any possibility  
13 that this coverage action will require the Arbor LLC defendants to  
14 abandon their denial of underlying liability or come forward with  
15 evidence tending to establish such liability. Thus, plaintiff  
16 argues, the Wilson's Distributing bar to adjudicating coverage  
17 actions does not prevent this action from proceeding.

18 Both plaintiff and the Arbor LLC defendants present arguments  
19 regarding the propriety of a stay: plaintiff contends that if the  
20 action is abated, it will be unable to properly assess damages and  
21 liability for a global mediation conference to be held in December  
22 2010. The Arbor LLC defendants note that because the declaratory  
23 relief action involves only the duty to indemnify, there is no harm  
24 to plaintiff to wait until the underlying lawsuit has concluded  
25 before proceeding with this coverage action. And, the Arbor LLC  
26 defendants continue, the detriment to them is clear because they  
27 will continue to incur fees in this action while possibly  
28 jeopardizing their defenses.



1 While the parties make generalized arguments about the pros  
2 and cons of a stay, the "conflicted position" issue is a fact-  
3 intensive inquiry for each case. Thus, I start by reciting the  
4 declarations sought by plaintiff in its Complaint and discussing  
5 whether moving forward with litigation over these declarations now  
6 would force the Arbor LLC defendants to "prematurely litigate  
7 [their] potential liability in [the] underlying [action] and  
8 require [them] to take inconsistent positions."

9 The six declarations are as follows:

10 Because all claims against the potential insureds are  
11 based on conduct prior to July, 2005, no coverage is  
12 available under policy years incepting in or after July,  
13 2005.

14 Because the Policy did not incept until July 23, 2003,  
15 and because coverage is limited to damages arising from  
16 occurrences during the Policy period, no coverage is  
17 available for damages arising from the potential  
18 insureds' conduct prior to July 23, 2003.

19 Because the potential insureds only potentially qualify  
20 as insureds in their roles as directors, officers and/or  
21 real estate managers of Association, no coverage is  
22 available for any damages arising out of the potential  
23 insureds' conduct in other roles, specifically including,  
24 but not limited to, the potential insureds' roles in  
25 designing, developing, building, marketing and selling  
26 the Townhouses.

27 No coverage is available to the potential insureds under  
28 Policy Option DO because: (1) Option DO was not in  
effect during the time the potential insureds were  
directors and/or officers of the Association; (2) all  
coverage under that Option is barred pursuant to the  
Developer/Sponsor Exclusion Endorsement; and (3) there  
has not been a timely "occurrence" pursuant to paragraph  
5(b) of Option DO.

Pursuant to the Professional Services Exclusion, no  
coverage is available for damages arising from the  
potential insureds' rendering or failure to render  
professional services, including but not limited to,  
accounting, supervisory and/or inspection services. For  
example, and without any limitation, the exclusion bars  
coverage for all damages arising from the potential  
insureds' alleged failure to discover and/or disclose

1 construction defects and associated damages as well as  
2 all damages arising from the potential insureds' alleged  
mishandling of defendant Association's financial affairs.

3 Pursuant to Exclusion 14, no coverage is available for  
4 loss of use damages, arising out of the potential  
5 insureds' improper work and/or failure to provide proper  
warnings or instructions, to portions of the Townhouses  
that have not been physically injured.

6 Compl. at ¶ 19A, 19B, 19C, 19D, 19E, 19F.

7 Initially, a declaration regarding any "conduct" is  
8 problematic. The policy does not speak in terms of "conduct," but  
9 rather, in terms of property damage and occurrences. Thus,  
10 declarations that seek a determination of "conduct" suggest that  
11 the Arbor LLC defendants must bring forth facts in this case,  
12 forcing them to prematurely develop facts relevant to the  
13 underlying case which can put them in a conflicted position.

14 To the extent that the proposed declarations do not encompass  
15 the Arbor LLC defendants' conduct, they essentially seek an  
16 advisory opinion based on purely hypothetical situations. While  
17 there might be a concrete dispute between plaintiff and defendants  
18 regarding the scope of the insurance policy's coverage, the  
19 proposed declarations as currently structured by plaintiff to limit  
20 the potential conflicts for the Arbor LLC defendants, are divorced  
21 from the actual facts and thus, are abstract and advisory.

22 It is well recognized that courts do not issue advisory  
23 opinions. See, e.g., Laird v. Tatum, 408 U.S. 1, 13-14 (1972)  
24 ("the federal courts established pursuant to Article III of the  
25 Constitution do not render advisory opinions."); Kittel v. Thomas,  
26 620 F.3d 949, 951 (9th Cir. 2010) (federal courts may not issue  
27 advisory opinions).

28 Additionally, the law recognizes that questions regarding an

1 insurer's duty to indemnify are based on the actual facts in the  
2 underlying litigation, not the alleged facts. See e.g., Bituminous  
3 Cas. Corp. v. Kerr Contractors, Inc., No. CV-10-78-MO, 2010 WL  
4 2572772, at \*5 (D. Or. June 22, 2010) (noting that under Oregon  
5 law, unlike the duty to defend, liability for indemnity derives  
6 from factual determinations separate from the allegations in the  
7 complaint); Ledford v. Gutoski, 319 Or. 397, 403, 877 P.2d 80, 84  
8 (1994) ("Even when an insurer does not have a duty to defend based  
9 on the allegations in the initial complaint, the facts proved at  
10 trial on which liability is established may give rise to a duty to  
11 indemnify if the insured's conduct is covered."). Moreover,  
12 plaintiff concedes that as this case moves forward, it is likely to  
13 seek additional declarations, resulting in a piecemeal and  
14 inefficient resolution of the issues if a decision on some  
15 declarations is issued now.

16 On balance, litigating the requested declarations at this  
17 point either has the potential to force the Arbor LLC defendants to  
18 take conflicting positions, and is likely to result in an advisory  
19 opinion. Neither result is acceptable. Combined with the fact  
20 that plaintiff will seek additional declarations later as the  
21 underlying case develops, the better option is to stay the case  
22 pending resolution of the underlying case. Thus, I grant the  
23 motion to abate.

### 24 III. Motion to Dismiss

25 In their Answer, the Arbor LLC defendants bring two  
26 counterclaims against plaintiff: breach of fiduciary duty and  
27 breach of the implied covenant of good faith and fair dealing.  
28 Plaintiff moves to dismiss the claims for failure to state a claim.

1 In support of the fiduciary duty claim, the Arbor LLC  
2 defendants contend that plaintiff's defense of the Arbor LLC  
3 defendants in the underlying litigation has created a special  
4 relationship between plaintiff and the Arbor LLC defendants that  
5 requires an enhanced duty of care and imposes fiduciary obligations  
6 on plaintiff. Arbor LLC Defts' Answer at ¶ 28. The Arbor LLC  
7 defendants allege that contrary to plaintiff's enhanced duty of  
8 care to defendants, and in violation of its fiduciary obligations  
9 to defendants, plaintiff filed this suit, seeking to limit  
10 coverage. Id. at ¶ 30.

11 The Arbor LLC defendants contend that they cannot defend  
12 against the issues raised by plaintiff in this case without  
13 litigating the facts of the underlying dispute. Id. They further  
14 contend that the filing of this lawsuit puts the Arbor LLC  
15 defendants in the "conflicted position" of trying legal and factual  
16 matters that are at issue in the underlying litigation in violation  
17 of Wilson's Distributing. Id. at ¶ 31. In so doing, the Arbor LLC  
18 defendants allege, plaintiff has placed its own interests above  
19 those of its insured. Id. Plaintiff allegedly knows, or should  
20 know, that suing its insured is prohibited by Oregon law. Id.  
21 Plaintiff's filing of this action allegedly constitutes a breach of  
22 its fiduciary obligations to the Arbor LLC defendants. Id.

23 As for the breach of the implied covenant of good faith and  
24 fair dealing claim, the Arbor LLC defendants allege that the  
25 insurance policy contains an implied contractual covenant of good  
26 faith and fair dealing which requires that no party do anything to  
27 injure the rights of another to receive the benefits of the  
28 agreement. Id. at ¶ 34. They contend that plaintiff breached this

1 covenant by filing suit against defendants during the course of the  
2 underlying litigation seeking to limit coverage. Id. at ¶ 35. The  
3 Arbor LLC defendants contend that plaintiff's case raises  
4 overlapping legal and factual issues and they cannot defend against  
5 those issues without litigating substantially all of the facts in  
6 the underlying dispute. Id.

7 As with the breach of fiduciary duty claim, the Arbor LLC  
8 defendants contend that plaintiff's suit puts the Arbor LLC  
9 defendants in the conflicted legal position of trying legal and  
10 factual matters at issue in the underlying litigation, in order to  
11 prove coverage under the policy, which, the Arbor LLC defendants  
12 assert, violates the law in Wilson's Distributing. Because  
13 plaintiff has placed its own interests above those of its insured,  
14 its filing of the lawsuit allegedly violates the implied covenant  
15 of good faith and fair dealing. Id. at ¶ 36.

16 In support of its motion, plaintiff notes that no known case  
17 has ever held that the mere act of filing a declaratory judgment  
18 action to construe an insurance policy constitutes a breach of  
19 fiduciary duty or a breach of the implied covenant of good faith  
20 and fair dealing. Plaintiff is correct. Additionally, plaintiff  
21 correctly notes that this Court, and the Ninth Circuit, have at  
22 least implicitly recognized the insurer's right to bring a coverage  
23 action while underlying litigation is still pending. American  
24 States, 318 F.3d at 891 (noting that insurer could "litigate the  
25 indemnity issue without awaiting the resolution of the underlying  
26 action"); Allstate Ins. Co. v. DeLoretto, No. CV-07-310-AA, 2007 WL  
27 3408135, at \*2-3 (D. Or. Nov. 16, 2007) (granting summary judgment  
28 to insurer in coverage action filed while underlying litigation

1 still pending); Allstate Ins. Co. v. Hall, No. CV-06-653-BR, 2006  
2 WL 2519608, at \*5 (D. Or. Aug. 29, 2006) (denying an insured's  
3 motion to dismiss because, among other reasons, the coverage action  
4 "will not interfere with or directly impact the underlying state-  
5 court action" and "will serve a useful purpose in clarifying the  
6 legal relations at issue").

7 The Arbor LLC defendants contend that their counterclaims  
8 survive the motion because they have sufficiently pleaded all the  
9 facts needed to support the claims and their allegations, taken as  
10 true, support each element of each claim. The problem, however, is  
11 that without some authority, I am unwilling to conclude that the  
12 mere fact of filing the coverage action can constitute a breach of  
13 fiduciary duty or a breach of the implied covenant of good faith  
14 and fair dealing. That is, plaintiff's filing a complaint seeking  
15 clarification of its coverage obligations while the underlying  
16 lawsuit is pending is insufficient, as a matter of law, to support  
17 the counterclaims. Thus, even accepting the allegations as true,  
18 I grant the motion to dismiss.

19 CONCLUSION

20 Defendants' motion to abate [21] is granted. Plaintiff's  
21 motion to dismiss the counterclaims [15] is granted.

22 IT IS SO ORDERED.

23 Dated this 18th day of January, 2011.

24  
25 /s/ Dennis J. Hubel

26 \_\_\_\_\_  
27 Dennis James Hubel  
28 United States Magistrate Judge