

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Nov 12, 2021

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MID-CENTURY INSURANCE
COMPANY, a California corporation
doing business in Washington,

Plaintiff/Intervenor Defendant,

and

LIBERTY MUTUAL FIRE
INSURANCE COMPANY and
LIBERTY INSURANCE
COMPANY,

Intervenor Plaintiffs,

v.

ACI NORTHWEST, INC., an Idaho
corporation,

Defendant.

NO: 2:20-CV-406-RMP

ORDER GRANTING INTERVENOR
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT is a Motion for Summary Judgment by Intervenor
Plaintiffs Liberty Mutual Fire Insurance Company and Liberty Insurance
Corporation (collectively, "Liberty Mutual"), ECF No. 24. The Court has reviewed

ORDER GRANTING INTERVENOR PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT ~ 1

1 Liberty Mutual’s Motion, ECF No. 24, Statement of Undisputed Material Facts,
2 ECF No. 24-2, and supporting declarations and exhibits, ECF Nos. 24-3 through 24-
3 5; Defendant ACI Northwest, Inc.’s Joinder with Liberty Mutual, ECF No. 26;
4 Plaintiff and Defendant-in-Intervention Mid-Century Insurance Company’s (“Mid-
5 Century’s”) Opposition, ECF No. 27, Statement of Disputed Material Facts, ECF
6 No. 28, and supporting declaration and exhibits, ECF No. 29; and Liberty Mutual’s
7 Reply, ECF No. 31, and Statement of Material Facts Not in Dispute, ECF No. 31-1;
8 heard oral argument; reviewed the remaining record and the relevant law, and is
9 fully informed.

10 **BACKGROUND**

11 The following facts are undisputed unless otherwise noted.

12 ***Underlying Litigation***

13 This case arises out of an underlying case, separately before this Court,
14 *Jeanette Hotes-Aprato, Personal Representative of Estate of Robert J. Aprato, Jr. v.*
15 *ACI, Northwest, Inc.*, No. 2:19-cv-200-RMP (E.D. Wash.). The underlying case was
16 precipitated by Robert Aprato’s death following an accident at work on December
17 21, 2016. The complaint filed by Mr. Aprato’s Estate alleges that Mr. Aprato was
18 driving a dump truck hauling ore from the Buckhorn Mine in Okanogan County,
19 Washington, when the truck’s brakes failed, and the truck careened over an
20 embankment and fell twenty feet to the roadway below. Giddings Excavation, LLC
21 (“Giddings”) owned the dump truck and employed Mr. Aprato. ACI had

1 subcontracted with Giddings to provide a truck and a driver to assist in hauling ore.
2 Mr. Aprato’s Estate filed a wrongful death action against ACI, alleging negligence
3 based on a failure to maintain a safe work environment, including sufficiently
4 inspecting and maintaining the truck that Mr. Aprato was driving.

5 The complaint in the underlying case further alleges that the United States
6 Department of Labor’s Mine Safety and Health Administration (“MSHA”)
7 investigated Mr. Aprato’s fatal accident and “determined that the braking systems on
8 the truck and trailer that Robert Aprato had been driving had not been maintained in
9 a functional condition” and that the “brake defects had existed over an extended
10 period of time and there were no indications or records that maintenance or repairs
11 had been conducted for the braking system, or records showing that [ACI] had been
12 ensuring that such maintenance was occurring.” ECF No. 1-2 at 3 in Case No. 2:19-
13 cv-200-RMP. The complaint in the underlying case alleges negligent inspection and
14 maintenance of the brakes on the truck and trailer driven by Mr. Aprato and does not
15 allege a breach of duty with respect to any incident other than the truck accident.

16 *See id.* at 3–4.

17 In August 2020, the Court granted in part a partial summary judgment motion
18 brought by Mr. Aprato’s Estate and ruled that “Defendant ACI shall be liable for
19 non-party Giddings’ negligence, if proven to a factfinder, as a matter of law based
20 on a common law theory of direct liability and a control theory of vicarious
21 liability.” ECF No. 57 in Case No. 2:19-cv-200-RMP.

1 *ACI and Giddings' Subcontract*

2 Approximately two months before Mr. Aprato's accident, ACI and Giddings
3 entered into a subcontract providing for Giddings, as subcontractor, to haul ore from
4 the Buckhorn Mine (the "Subcontract"). With respect to indemnification, the
5 Subcontract provides:

6 **Article 7. INDEMNIFICATION:** To the fullest extent permitted by
7 law, Subcontractor shall indemnify and hold harmless Owner,
8 Architect, Architect's consultants and Contractor from all damages,
9 losses, or expenses, including attorney's fees, from any claims or
10 damages for bodily injury, sickness, disease, or death, or from claims
11 for damage to tangible property, other than the work itself. This
12 indemnification shall extend to claims resulting from performance of
13 this Subcontract and shall apply only to the extent that the claim or loss
14 is caused in some part by a party to be indemnified. The obligation of
15 Subcontractor under this Article shall not extend to claims or losses that
16 are primarily caused by the Architect, or Architect's consultant's
17 performance or failure to perform professional responsibilities.

18 ECF No. 24-3 at 5.

19 The Subcontract also contains a "Subcontract Schedule of Values," which
20 provides: "Subcontractor's driver shall perform daily truck inspections" and that
21 "[a]ll supplies, parts and repairs [are] the responsibility of Subcontractor." ECF No.
24-3 at 8.

Mid-Century Policy

 Mid-Century issued a Business Automobile Policy to Giddings (the "Mid-
Century Policy"), which covers "all sums an 'insured' legally must pay as damages
because of 'bodily injury' or 'property damage' . . . caused by an 'accident' and

1 resulting from the ownership, maintenance or use of a covered ‘auto.’” ECF No. 24-
2 4 at 31. The Mid-Century Policy defines “insureds,” in relevant part as:

3 a. You for any covered “auto”.

4 . . .

5 c. Anyone liable for the conduct of an “insured” described above but
6 only to the extent of that liability.

7 ECF No. 24-4 at 31–32.

8 The dump truck that Mr. Aprato was driving in his fatal accident was
9 owned by Giddings and was a “covered ‘auto’” under the Mid-Century Policy.

10 *See* ECF Nos. 27 at 3; 28 at 1–4.

11 The Mid-Century Policy also imposes a “duty to defend any ‘insured’
12 against a ‘suit’ asking for” damages because of bodily injury caused by an
13 accident and resulting from the ownership, maintenance, or use of a covered
14 auto. ECF No. 24-4 at 31. The duty to defend does not extend to any “‘suit’
15 seeking damages for ‘bodily injury’ . . . to which this insurance does not
16 apply.” *Id.*

17 The Mid-Century Policy provides that liability coverage for an
18 “insured” is subject to the following policy exclusion:

19 B. Exclusions

20 This insurance does not apply to any of the following:

21 . . .

2. Contractual

Liability assumed under any contract or agreement.

But this exclusion does not apply to liability for damages:

1 a. Assumed in a contract or agreement that is an
2 “insured contract” provided the “bodily injury” or
3 “property damage” occurs subsequent to the execution of
4 the contract or agreement;

5 b. That the “insured” would have in the absence of the
6 contract or agreement.

7 . . .

8 ECF No. 24-4 at 32.

9 The Mid-Century Policy defines “insured contract” to mean, in relevant
10 part: “That part of any other contract or agreement pertaining to your business
11 . . . under which you assume the tort liability of another to pay for ‘bodily
12 injury’ or ‘property damage’ to a third party or organization. Tort liability
13 means a liability that would be imposed by law in the absence of any contract
14 or agreement.” ECF No. 24-4 at 40.

15 With respect to other applicable insurance, the Mid-Century Policy
16 provides:

17 a. For any covered “auto” you own, this coverage form provides
18 primary insurance.

19 . . .

20 c. Regardless of the provisions of Paragraph a. above, this coverage
21 form’s Liability Coverage is primary for any liability assumed under an
“insured contract”.

ECF No. 24-4 at 38.

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1 ***Liberty Mutual Policies***

2 Liberty Mutual Fire Insurance Company issued a Commercial General
3 Liability (“CGL”) policy and Liberty Insurance Corporation issued an
4 Umbrella Excess Policy (collectively, “Liberty Mutual Policies”) to ACI.

5 With respect to “Other Insurance,” the Liberty CGL policy provides:

6 a. This insurance is primary except when Paragraph b. below applies.
7 If this insurance is primary, [Liberty Mutual’s] obligations are not
8 affected unless any of the other insurance is also primary. Then, we will
9 share with all that other insurance by the method described in Paragraph
10 c. below.

11 ECF No. 24-5 at 27. Under “Paragraph b,” the Liberty CGL insurance is
12 “excess,” not primary, when, among other circumstances, “the loss arises out
13 of the maintenance or use of . . . ‘autos’.” *Id.* (Section 4(b)(1)(iv)).

14 The “Excess Insurance” provision further states:

15 (2) When this insurance is excess, we will have no duty under
16 Coverages A or B to defend the Insured against any “suit” if any other
17 insurer has a duty to defend the insured against that “suit.” If no other
18 insurer defends, we will undertake to do so, but we will be entitled to
19 the insured's rights against all those other insurers.

20 (3) When this insurance is excess over other Insurance, we will pay
21 only our share of the amount of the loss, if any, that exceeds the sum
of:

- (a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
- (b) The total of all deductible and self-insured amounts under all that other insurance.

(4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not

1 bought specifically to apply in excess of the Limits of Insurance shown
2 in the Declarations of this Coverage Part.

3 ECF No. 24-5 at 27.

4 In “Paragraph c” of the “Other Insurance” section, the Liberty GCL
5 policy provides a “Method of Sharing”:

6 If all of the other insurance permits contribution by equal shares, we
7 will follow this method also. Under this approach each insurer
8 contributes equal amounts until it has paid its applicable limit of
9 insurance or none of the loss remains, whichever comes first.

10 If any of the other insurance does not permit contribution by equal
11 shares, we will contribute by limits. Under this method, each insurer’s
12 share is based on the ratio of its applicable limit of insurance to the total
13 applicable limits of insurance of all insurers.

14 ECF No. 24-5 at 27.

15 The Liberty Umbrella Excess Policy provides that it is “excess over,
16 and will not share or contribute, with any ‘other insurance,’ whether primary,
17 excess, contingent or on any other basis.” ECF No. 24-5 at 149.

18 ACI tendered the defense of the underlying litigation to Mid-Century,
19 and Mid-Century initially denied both defense and indemnity coverage on the
20 assertion that ACI is not an insured based upon the allegations in the
21 complaint in the underlying litigation. ECF No. 1 at 5.

On approximately August 26, 2020, Mid-Century and Liberty Mutual
agreed to contribute equally to ACI’s defense in the underlying litigation,
subject to a reservation of rights. ECF Nos 1 at 5; 16 at 5. Upon agreeing to

1 equally share the cost of defending ACI in the underlying litigation, Mid-
2 Century also agreed to reimburse Liberty Mutual for fifty percent of past
3 defense costs. *See* ECF Nos. 1 at 5; 24-2 at 5; 28 at 1–4.

4 *Procedural History*

5 Mid-Century filed a Complaint in the above-captioned case on October
6 30, 2020, raising a single claim for a declaratory judgment “declaring all of
7 the relative rights and responsibilities of the parties under the contracts of
8 insurance at issue herein” and declaring “whether [Mid-Century] has a duty
9 to provide coverage to ACI and is entitled to reimbursement of defense costs
10 paid for ACI’s defense.” ECF No. 1 at 8.

11 On January 25, 2021, Liberty Mutual filed a Complaint-in-Intervention
12 seeking declaratory relief finding that: (1) Mid-Century has an obligation to
13 defend ACI in the underlying litigation as an “additional insured” under the
14 Mid-Century Policy issued to Giddings; (2) the terms of the Mid-Century
15 Policy and the acts alleged in the underlying litigation give rise to an
16 obligation to indemnify ACI, in the underlying litigation, as an “additional
17 insured” under the Mid-Century Policy issued to Giddings; and (3) the terms
18 of the Mid-Century Policy and the acts alleged in the underlying litigation
19 give rise to “an immediate, primary obligation to defend and indemnify” ACI
20 by Mid-Century in the underlying litigation as an “additional insured” under
21 the Mid-Century Policy issued to Giddings. ECF No. 16 at 6–10. Liberty

1 Mutual also raises a fourth claim seeking equitable indemnity and
2 contribution. *See id.* at 10.

3 Liberty Mutual moves for summary judgment on its first cause of action
4 (duty to defend) and third cause of action (priority of coverage). ECF No. 24-
5 1 at 3. However, Liberty Mutual does not seek summary judgment on its
6 second cause of action (duty to indemnify) or fourth cause of action (equitable
7 indemnity and contribution). *See id.*

8 **LEGAL STANDARD**

9 Summary judgment is appropriate when there is no genuine issue of material
10 fact that would preclude the entry of judgment as a matter of law. Fed. R. Civ. P.
11 56(a). The Court views the evidence “in the light most favorable to the nonmoving
12 party . . . and draw[s] all reasonable inferences in that party's favor.” *Colony Cove*
13 *Props., LLC v. City of Carson*, 888 F.3d 445, 450 (9th Cir. 2018). The moving party
14 bears the burden of showing the absence of a genuine issue of material fact, or in the
15 alternative, the moving party may discharge this burden by showing that there is an
16 absence of evidence to support the nonmoving party’s prima facie case. *Celotex*,
17 477 U.S. at 325. The burden then shifts to the nonmoving party to set forth specific
18 facts showing a genuine issue for trial. *See id.* at 324. The nonmoving party “may
19 not rest upon the mere allegations or denials of his pleading, but his response, by
20 affidavits or as otherwise provided . . . must set forth specific facts showing that
21 there is a genuine issue for trial.” *Id.* at 322 n.3 (internal quotations omitted).

1 Summary judgment should be granted where the nonmoving party does not come
2 forth with evidence from which a reasonable fact finder could return a verdict in its
3 favor. *Singh v. Am. Honda Fin. Corp.*, 925 F.3d 1053, 1071 (9th Cir. 2019).

4 DISCUSSION

5 Liberty Mutual seeks summary judgment on their first cause of action,
6 alleging that Mid-Century owes a duty to defend ACI, and on their third cause of
7 action, alleging that any obligations by Mid-Century are primary to any obligations
8 owed by Liberty Mutual. ECF No. 24-1 at 2–3. ACI adds that if Liberty Mutual’s
9 Motion for Summary Judgment is granted, then the Court also should dismiss with
10 prejudice all claims by Mid-Century in its Complaint against ACI and award “all
11 costs allowed by law to ACI and against, and to be paid by, Mid-Century.” ECF No.
12 26 at 2.

13 Mid-Century maintains that it opposes summary judgment only in part, as it
14 agrees “that its duty to defend [ACI] was triggered and that it has a duty to defend *at*
15 *this time*.” ECF No. 27 at 2 (emphasis in original). However, Mid-Century opposes
16 summary judgment with respect to the priority of coverage by arguing that Liberty
17 Mutual has not established that ACI is an “insured” under the Mid-Century policy
18 because ACI has not yet been held liable for the negligence of Giddings. *See* ECF
19 No. 27 at 18–19. Mid-Century also argues that ACI cannot be an insured under the
20 Mid-Century policy, and Liberty Mutual’s policies are primary, for purposes of
21 ACI’s own acts of negligence, the liability for which remains at issue in the

1 underlying litigation. *See id.* at 2–3. Mid-Century maintains that Liberty Mutual
2 and Mid-Century both have a duty to defend ACI for their respective insured’s
3 conduct. Therefore, Mid-Century argues, summary judgment is premature until a
4 factfinder in the underlying litigation determines whether ACI is liable for its own
5 negligence or for the conduct of non-party Giddings. *See* ECF No. 27 at 2–3.

6 Liberty Mutual counters that if Mid-Century has a duty to defend, it is
7 primary, according to the language of the insurance contracts at issue. Therefore,
8 Liberty Mutual argues that there is no genuine issue of material fact that persists due
9 to any unresolved question in the underlying litigation.

10 This matter is before the Court on diversity jurisdiction. *See* ECF No. 1 at 2;
11 28 U.S.C. § 1332. Therefore, the Court applies Washington state substantive law.
12 *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1934). The interpretation of an insurance
13 contract is a question of law. *Woo v. Fireman’s Fund Ins. Co.*, 161 Wn.2d 43, 52
14 (Wash. 2007). Washington courts “interpret insurance contracts as an average
15 person would and in a manner that gives effect to each provision of the policy.”
16 *N.H. Indem. Co. v. Budget Rent-A-Car Sys.*, 148 Wn.2d 929, 933 (Wash. 2003).

17 The Washington Supreme Court has recognized that “[t]he rule regarding the
18 duty to defend is well settled in Washington and is broader than the duty to
19 indemnify.” *Woo*, 161Wn.2d at 52. The duty to defend arises at the time an action
20 is filed, “and is based on the potential for liability.” *Truck Ins. Exch. v. VanPort*
21 *Homes, Inc.*, 147 Wn.2d 751, 760 (Wash. 2002). If a complaint is ambiguous as to

1 whether it triggers the duty to defend, Washington courts liberally construe the
2 complaint in favor of finding a duty to defend. *Id.* “In contrast, the duty to
3 indemnify ‘hinges on the insured’s *actual liability* to the claimant and *actual*
4 *coverage* under the policy.” *Woo*, 161 Wn.2d at 53 (quoting *Hayden v. Mut. of*
5 *Enumclaw Ins. Co.*, 141 Wn.2d 55, 64 (Wash. 2000) (emphasis added in *Woo*)).

6 It is undisputed that Giddings agreed in its subcontract with ACI to indemnify
7 ACI for Giddings’ negligence. *See* ECF No. 27 at 4. Mid-Century acknowledges
8 that the subcontract between Giddings and ACI qualifies as an “insured contract” for
9 purposes of the Mid-Century Policy, “but only to the extent of Giddings’ liability.”
10 *Id.* at 11 (emphasis in original removed). Mid-Century continues that Giddings did
11 not indemnify ACI for ACI’s own negligence, and Mid-Century asserts that,
12 therefore, there is a material question of fact as to whether ACI will be held liable
13 for its own negligence in the underlying litigation. *See id.* at 4.

14 The Mid-Century Policy defines an “insured” as the policy holder, Giddings,
15 “for any covered ‘auto.’” ECF No. 24-4 at 31–32. An “insured” is also “anyone
16 liable for the conduct of [Giddings] but only to the extent of that liability.” *Id.*
17 The Court already found in the underlying litigation that ACI “shall be liable for
18 non-party Giddings’ negligence, if proven to a factfinder.” ECF No. 57 in Case
19 No. 2:19-cv-200-RMP. A duty to defend arises in Washington law when an action
20 is initiated, “and is based on the potential for liability.” *Truck Ins.*, 147 Wn.2d at
21

1 760. Therefore, ACI is an “insured” under the Mid-Century Policy for purposes of
2 a duty to defend ACI in the underlying litigation.

3 Indeed, Mid-Century agrees that it has a duty to defend, but disputes only
4 whether its duty can be determined to be primary before it is known whether ACI
5 will be found liable for its own negligence. Mid-Century does not cite to a
6 contractual provision in any of the insurance policies at issue to support this
7 assertion; nor does Washington caselaw support such an outcome.

8 Rather, the Mid-Century Policy states that its coverage “provides primary
9 insurance” for any “covered ‘auto’” and “for any liability assumed under an
10 ‘insured contract.’” ECF No. 24-4 at 38. Under the Mid-Century Policy, an
11 “insured,” in this case Giddings, is entitled to primary insurance for liability when
12 an accident arising out of the “ownership, maintenance or use” of a “covered
13 ‘auto’” causes bodily injury or damages. ECF No. 24-4 at 31–32, 38. There is no
14 dispute that the Giddings-owned truck was a covered auto or that Giddings is an
15 “insured.” ECF Nos. 24-2 at 2, 5; 28.

16 In addition, applying the Mid-Century Policy’s provision concerning
17 primary insurance for an “insured contract,” there is no dispute that the subcontract
18 between Giddings and ACI is an “insured contract,” as it indemnifies ACI from a
19 claim for bodily injury or death resulting from any negligent act or omission by
20 Giddings in the underlying litigation. *See* ECF No. 24-3 at 5. Furthermore, the
21 Mid-Century Policy exclusions do not apply to any liability for damages that is

1 assumed through an insured contract or that the insured would have in the absence
2 of the contract or agreement. ECF No. 24-4 at 32. Despite exclusions set forth in
3 the Mid-Century Policy, the Mid-Century Policy covers liability for damages that
4 is assumed through an insured contract or that the insured would have in the
5 absence of the contract or agreement. *See* ECF No. 24-4 at 32; *see also Campbell*
6 *v. Ticor Title Ins. Co.*, 166 Wn.2d 466, 472 (2009) (Washington courts “strictly
7 and narrowly” construe exceptions when interpreting an insurance policy).

8 Moreover, the duty to defend in the Mid-Century Policy covers any
9 “‘insured’ against a ‘suit’ asking for” damages because of bodily injury caused by
10 an accident and resulting from the ownership, maintenance, or use of a covered
11 auto. ECF No. 24-4 at 31. The Mid-Century Policy does not qualify this duty to
12 defend as limited to situations when only the insured’s, in this case Giddings’,
13 liability is at issue. The exception to Mid-Century’s duty to defend Giddings
14 applies only where a suit seeks “damages for ‘bodily injury’ to which this
15 insurance does not apply.” ECF No. 24-4 at 31. As this Court has determined in
16 the underlying litigation, ACI shall be liable for non-party Giddings’ negligence,
17 and the complaint in the underlying litigation alleges that Mr. Aprato was fatally
18 injured when ACI failed to maintain a safe work environment, and that Giddings
19 and ACI failed to sufficiently inspect and maintain the truck that Mr. Aprato was
20 driving. ECF Nos. 1-2 at 3; 57 in Case No. 2:19-cv-200-RMP. Therefore, by the
21

1 plain terms of the Mid-Century Policy, Mid-Century has a duty to defend in the
2 underlying litigation.

3 Looking to the Liberty Mutual Policies, the Liberty GCL policy explicitly
4 provides that its insurance is “excess” when “the loss arises out of the maintenance
5 or use of ‘autos.’” ECF No. 24-5 at 27. Again, the complaint in the underlying
6 litigation alleges bodily injury and damages from the use or maintenance of the
7 covered Giddings-owned truck. *See* ECF No. 1-2 at 3 in Case No. 2:19-cv-200-
8 RMP.

9 Furthermore, none of the insurance contracts at issue, neither the Mid-
10 Century Policy nor the Liberty Mutual Policies, provides for the fifty/fifty split of
11 defense costs that Mid-Century seeks to retain as the abiding arrangement until a
12 final liability determination is made in the underlying litigation. Rather, giving
13 effect to each pertinent provision of the policies, the Mid-Century Policy is
14 primary for purposes of a duty to defend, and the Liberty Mutual Policies are
15 excess, in light of the relationship between ACI and Giddings and the alleged
16 conduct and harm in the underlying litigation. *See N.H. Indem. Co.*, 148 Wn.2d at
17 933. For purposes of the duty to defend, Washington law looks at the relationship
18 of the parties at the outset of an action, and Mid-Century is liable for the conduct
19 of Giddings in the underlying litigation, to the extent that Giddings is determined
20 liable. *See Truck Ins.*, 147 Wn.2d at 760.

1 Therefore, viewing the undisputed facts in the light most favorable to Mid-
2 Century, the Court finds that, under the Mid-Century Policy, Mid-Century owes a
3 duty to defend ACI in the underlying litigation that is primary to any obligation by
4 Liberty Mutual. However, the Court does not find that dismissal with prejudice of
5 Mid-Century's Complaint in its entirety, as ACI requests in its Joinder, is
6 appropriate because Liberty Mutual's Motion for Summary Judgment on their first
7 and third prayers for relief in their Complaint-in-Intervention does not resolve
8 Mid-Century's Complaint in its entirety . *See* ECF No. 26 at 2. Liberty Mutual's
9 Motion for Summary Judgment seeks judgment only with respect to Mid-
10 Century's duty to defend and the priority of coverage, which the Court does find is
11 appropriate for summary judgment at this juncture. ECF No. 24-1 at 3. Mid-
12 Century's Complaint seeks a declaration of "all of the relative rights and
13 responsibilities of the parties under the contracts of insurance at issue herein," and
14 Liberty Mutual acknowledges that it is premature to determine whether ACI is
15 entitled to indemnification from Mid-Century under the Mid-Century Policy. ECF
16 No. 1 at 8.

17 Accordingly, **IT IS HEREBY ORDERED:**

18 1. Intervenor Plaintiffs Liberty Mutual's Motion for Summary Judgment,
19 **ECF No. 24**, is **GRANTED**.

20 2. Defendant ACI's request for dismissal with prejudice of Plaintiff Mid-
21 Century's Complaint in full is denied. *See* ECF No. 26 at 2

