



1 Plaintiff argues that the claims alleged in the underlying action are potentially covered by  
2 Defendant's policies, and Defendant is, therefore, obligated to defend Bob Baker Lexus.

3 In response, Defendant filed the present motion to dismiss, arguing that Plaintiff lacks  
4 standing to assert a cause of action for declaratory judgment. The motion was brought pursuant to  
5 Federal Rules of Procedure 12(b)(1) and 12(b)(6). But because standing "pertain[s] to a federal  
6 court's subject-matter jurisdiction under Article III, [it is] properly raised in a motion to dismiss  
7 under Federal Rule of Civil Procedure 12(b)(1), not Rule 12(b)(6)." *White v. Lee*, 227 F.3d 1214,  
8 1242 (9th Cir. 2000). Thus, the Court interprets Defendant's motion as a 12(b)(1) motion.

9 "A plaintiff has the burden of establishing the elements required for standing . . ." *Takhar*  
10 *v. Kessler*, 76 F.3d 995, 1000 (9th Cir. 1996). Rule 12(b)(1) motions may challenge jurisdiction  
11 facially or factually. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "In a  
12 facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on  
13 their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the  
14 truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.*

15 Defendant's standing challenge is facial; Defendant contends that Plaintiff's allegations are  
16 insufficient on their face to establish standing. *See Wolfe v. Strankman*, 392 F.3d 358, 362 (9th  
17 Cir. 2004). Plaintiff's complaint alleges that its "policies are excess policies and do not attach, if  
18 at all, until all underlying and other insurance has been exhausted, including but not limited to all  
19 of [Defendant's] policies." (Compl. ¶ 25.) And because "Plaintiff pleads it does not have a duty  
20 to defend and is not defending," Defendant argues that Plaintiff "lacks standing to assert a claim  
21 against [Defendant] . . . with regard to the duty to defend." (Mot. to Dismiss at 1.)

22 This Court agrees. Under Article III, courts may adjudicate only actual cases or  
23 controversies. U.S. Const. art. III, § 2, cl.1. Part of this requirement involves the doctrine of  
24 standing, which requires Plaintiff suffer an actual or imminent injury in fact. *See Lujan v.*  
25 *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). But Plaintiff's allegations fail to set forth the  
26 existence of such injury. At best, Plaintiff establishes that, once the underlying action resolves, it  
27 could be affected by Defendant's refusal to defend. But until then, Plaintiff is unaffected by  
28 Defendant's refusal.

1 Plaintiff argues two reasons for why it has standing. First, Plaintiff argues that “as a  
2 co-insurer . . . [Plaintiff] is entitled to a determination of the obligations of Tokio Marine in  
3 connection with the Underlying Action.” (Opp’n at 5.) This argument glosses over the parties  
4 current rights and liabilities. In some situations, co-insurers are entitled to a determination of each  
5 other’s obligations. But they cannot avoid Article III. And unlike Plaintiff’s citations, Plaintiff  
6 has not yet satisfied Article III. *See State Farm Mut. Auto. Ins. Co. v. Mid-Continent Cas. Co.*,  
7 518 F.2d 292, 293 (10th Cir. 1975) (plaintiff had previously defended a tort suit and sued to  
8 establish defendant insurance company’s coverage); *Universal Underwriters Ins. Co. v. Am.*  
9 *Motorists Ins. Co.*, 363 F.2d 622 (9th Cir. 1966) (plaintiff sued for reimbursement from the  
10 defendant insurance company).

11 Second, Plaintiff argues that it “has standing to assert a claim for declaratory relief against  
12 [Defendant] regarding the duty to defend because [Plaintiff] is currently providing a defense to  
13 Bob Baker Lexus in the Underlying Action.” (Opp’n at 5.) But standing cannot be granted  
14 retroactively; this Court’s jurisdiction depends on the state of things at the time the suit was  
15 brought. *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993). Thus, the fact that Plaintiff is  
16 now providing a defense, even if that fact could establish standing, is irrelevant to the analysis.


17 Defendant filed its motion to dismiss on the basis that Plaintiff lacked standing to bring its  
18 first cause of action. Having found that Plaintiff lacks standing to assert its first cause of action,  
19 Defendant’s motion to dismiss is **GRANTED**. Plaintiff’s first cause of action is **DISMISSED**.

20 **IT IS SO ORDERED.**

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22 DATED: February 1, 2011

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Honorable Janis L. Sammartino  
United States District Judge

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