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## Finding the Right Insurance Policy: A Uniform Set of Guidelines for Applying the Burford Abstention Doctrine in Cases Involving State Insurance Insolvency Proceedings

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# **FINDING THE RIGHT INSURANCE POLICY: A UNIFORM SET OF GUIDELINES FOR APPLYING THE *BURFORD* ABSTENTION DOCTRINE IN CASES INVOLVING STATE INSURANCE INSOLVENCY PROCEEDINGS**

## **ABSTRACT**

*When a party moves for a federal court to invoke the Burford abstention doctrine to stay a case or remand it to state court, the court must determine if hearing the case will substantially disrupt a state's efforts to achieve a goal of public importance through a complex administrative scheme. Federal courts often reject motions to abstain from hearing a case on Burford grounds due to the compelling nature of mandatory jurisdiction. Accordingly, the United States Supreme Court has characterized the doctrine of abstention as "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it."*

*However, there is one area of law where courts often apply Burford abstention: cases involving a party undergoing a state insurance insolvency proceeding. This tendency for federal courts to stay or remand cases in deference to state proceedings in the insurance insolvency context derives from a longstanding Congressional policy of allowing states to regulate the insurance industry as embodied by the McCarran-Ferguson Act and the exclusion of insurance companies from the Bankruptcy Code.*

*This Comment will examine the processes used by different courts to determine whether to invoke Burford abstention and propose the adoption of a formula that builds upon a set of factors developed by the Tenth Circuit Court of Appeals to also address additional concerns. The proposed formula draws from case law and the policy goals underlying Burford abstention while emphasizing the role of avoiding the disruption of a state's efforts to establish insolvency proceedings for insurance companies. Through a six-part test, Courts can properly navigate the application of the "troublesome and enigmatic" Burford abstention doctrine.*

## INTRODUCTION

Imagine that you are badly injured following a serious car accident and desperately need the coverage that you are entitled to under your health insurance policy. Unfortunately, your insurance company, which is based in Georgia, is undergoing a state insolvency proceeding following financial difficulty. The Georgia Life & Health Guaranty Association covers a maximum of \$300,000 per individual when an insurance company cannot provide coverage due to insolvency,<sup>1</sup> but you need significantly more than that to pay your medical bills. Suddenly, a third party files a lawsuit in federal court against your insurance company through diversity jurisdiction. If the case proceeds, a verdict for the plaintiff could jeopardize the ability of your insurance company to provide for your expenses. However, there is a solution: the federal court could apply the rarely-invoked *Burford* abstention doctrine, dismissing the lawsuit or staying it until the insolvency proceeding has ended, which potentially frees up the funds necessary to pay for your expenses.

The Supreme Court established the *Burford* abstention doctrine in 1943,<sup>2</sup> but for many years courts rarely invoked it.<sup>3</sup> However, there is an exception: federal courts often apply *Burford* abstention in cases involving an insurance company undergoing a state insolvency proceeding.<sup>4</sup> One factor favoring federal abstention in this context is the McCarran-Ferguson Act, which provides that the states handle the regulation of “the business of insurance.”<sup>5</sup> Another factor is the exclusion of insurance companies from the Bankruptcy Code, which reinforces the significance of the development and administration

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<sup>1</sup> Ga. Code Ann. § 33-38-7 (LEXIS Through the 2016 Regular Session).

<sup>2</sup> *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

<sup>3</sup> Georgene M. Vairo, *Making Younger Civil: The Consequences of Federal Court Deference to State Court Proceedings – A Response to Professor Stravitz*, 58 *FORDHAM L. REV.* 173, 180–81 (1989) (discussing how *Burford* abstention was rarely invoked until a “renaissance” in the lower courts in the 1980s as exemplified by a federal court’s invocation of the doctrine in the context of a state insurance insolvency proceeding in *Law Insurance Co. v. Corcoran*, 807 F.2d 38 (2d Cir. 1986), *cert. denied*, 481 U.S. 1017 (1987)); see Leonard Birdson, *Comity and Our Federalism in the Twenty-First Century: The Abstention Doctrines Will Always Be With Us – Get Over It!!*, 36 *CREIGHTON L. REV.* 375, 419 (noting that between 2000 and 2003, *Burford* abstention was only invoked in three of the twelve federal appellate courts cases where it was considered).

<sup>4</sup> See, e.g., *Levy v. Lewis*, 635 F.2d 960 (2d Cir. 1980); *Corcoran v. Ardra Ins. Co.*, 842 F.2d 31 (2nd Cir. 1988) (*abrogated in part by* *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 710 (1996)); *Clark v. Fitzgibbons*, 103 F.3d 1049 (5th Cir. 1997); *Lentz v. Trinchard*, 730 F. Supp. 2d 567 (E.D. La. 2010); cf. *Brandenburg v. Seidel*, 859 F.2d 1179, 1191 (1988) (the risk of disrupting a complex state scheme for the insolvency of state-chartered savings and loan associations “presents a classic situation for *Burford* abstention”). But see, e.g., *Bilden v. United Equitable Ins. Co.*, 921 F.2d 822 (8th Cir. 1990).

<sup>5</sup> 15 U.S.C. § 1011 (2012).

of insolvency-related insurance regulation by the states.<sup>6</sup> Nonetheless, different federal courts often use different approaches to determine whether to abstain from hearing a case involving a party undergoing a state insurance insolvency proceeding on *Burford* grounds.<sup>7</sup>

To address the problematic inconsistency resulting from the application of these alternate methodologies, this Comment proposes that federal courts deciding whether to abstain on *Burford* grounds apply a set of factors that builds upon the formula used by the Tenth Circuit Court of Appeals in *Grimes v. Crown Life Ins. Co.* to address diversity and equity concerns. This approach entails the evaluation of six questions: (1) whether the cause of action is entirely federal; (2) whether resolving the suit requires the court to interfere with state policies related to insurance insolvency proceedings; (3) whether the state procedures indicate the presence of a state forum to adjudicate these issues; (4) whether difficult or unusual state laws are at issue; (5) whether the court is sitting in equity; and (6) whether, in a case brought to a federal court through diversity jurisdiction, the state that would hear it on a remand has a vested interest in its specific outcome.

## I. BACKGROUND

### A. Insurance Regulation on the State Level

In 1869, the Supreme Court first adopted the view that states are responsible for regulating the insurance industry in *Paul v. Virginia*.<sup>8</sup> Seventy-five years later, the Supreme Court changed direction in *United States v. South-Eastern Underwriters Ass'n*, holding that the business of insurance constituted interstate commerce subject to federal regulation.<sup>9</sup> In response to

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<sup>6</sup> 11 U.S.C. §§ 109(b)(2), (d) (2012).

<sup>7</sup> Compare *Fragoso v. Lope*, 991 F.2d 878, 885–86 (1st Cir. 1993) (declining to apply *Burford* abstention in the context of a state insolvency proceeding), with *Lac D'Amiante Du Quebec, Ltee v. Am. Home Assur. Co.*, 864 F.2d 1033, 1048 (3d Cir. 1988) (finding *Burford* abstention so clearly warranted in a case involving a party to an insurance insolvency proceeding as to reverse a district court's decision not to invoke it).

<sup>8</sup> See Willy E. Rice, *Federal Courts and The Regulation of The Insurance Industry: An Empirical and Historical Analysis Of Courts' Ineffectual Attempts To Harmonize Federal Antitrust, Arbitration, and Insolvency Statutes With the McCarran Ferguson Act-1941-1993*, 43 CATH. U.L. REV. 1 399, 399–400 (1994); *Paul v. Virginia* 75 U.S. 168, 183–86 (1869); see also *Sims v. Fid. Assurance Ass'n*, 129 F.2d 442, 448 (4th Cir. 1942) (noting that insurance companies are exempted from the Bankruptcy Act of 1898, 30 Stat. 544 (1898) (*superseded by* 95 Pub. L. No. 598 (1978)), *aff'd*, 318 U.S. 608 (1943)).

<sup>9</sup> See Rice, *supra* note 8, at 400; *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944); see also U.S. CONST. art. I, § 8, cl. 3 (“Congress shall have the Power . . . to regulate Commerce . . . among the several States . . .”).

the threat of federal antitrust actions against insurance companies brought about by this holding, the National Association of Insurance Commissioners helped formulate and successfully push for Congress to pass the McCarran-Ferguson Act to keep the regulation of the insurance industry at the state level.<sup>10</sup> The McCarran-Ferguson Act reads:

Declaration of policy - The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.<sup>11</sup>

Despite some calls to repeal the McCarran-Ferguson Act to allow for more federal regulation,<sup>12</sup> its embodiment of Congress's policy of leaving states to regulate "the business of insurance" remains intact.<sup>13</sup>

Judicial interpretations of the savings clause of the Employee Retirement Income Security Act of 1974 ("ERISA")<sup>14</sup> illustrate how the courts have acknowledged Congress's policy to have states control the regulation of the insurance industry.<sup>15</sup> ERISA includes notoriously complex pre-emption provisions declaring that it supersedes conflicting state laws,<sup>16</sup> but it also contains a savings clause ensuring that "nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities."<sup>17</sup> However, referencing language from the McCarran-Ferguson Act,<sup>18</sup> ERISA prohibits certain employee benefit plans from qualifying as engaged in the "business of insurance" and thus are exempt from pre-emption.<sup>19</sup>

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<sup>10</sup> Herbert H. Naujoks, *Eight Years After S.E.U.A. – Present Status of the Regulation of Insurance as Commerce*, 35 MARQ. L. REV. 339, 348 (1952); Proceedings of the NAIC, 75th Sess. 226 (1944); Proceedings of the NAIC, 76th Sess. 250 (1945); 15 U.S.C. § 1011 (2012).

<sup>11</sup> 15 U.S.C. § 1011 (2012).

<sup>12</sup> See, e.g., Jere W. Glover, *Should Congress Repeal McCarran-Ferguson?: It's Time to Repeal McCarran-Ferguson*, 1 ANTITRUST 31, 33 (1987).

<sup>13</sup> See, e.g., *Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141, 147 (8th Cir. 1995) (noting in a decision to invoke *Burford* abstention that "[t]here is a strong federal policy of deferring to state regulation of the insurance industry . . .").

<sup>14</sup> Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1461 (2012).

<sup>15</sup> See Karen A. Jordan, *ERISA Preemption: Integrating FABLE into the Savings Clause Analysis*, 27 RUTGERS L.J. 273, 274–77 (1996).

<sup>16</sup> See 29 U.S.C. § 1144(a) (2012).

<sup>17</sup> *Id.* § 1144(b)(2)(A).

<sup>18</sup> 15 U.S.C. § 1011 (2012) ("Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest . . .").

<sup>19</sup> 29 U.S.C. § 1144(b)(2)(B) (2012).

The Supreme Court construed the ERISA savings clause broadly in *Metropolitan Life Insurance Co. v. Massachusetts*, establishing the use of three criteria for determining if a particular practice falls within the “business of insurance” for the purposes of the McCarran-Ferguson Act. These factors relate to whether the practice (1) transfers or spreads a policyholder’s risk, (2) is an integral part of the insurer-insured policy relationship, and (3) is limited to entities in the insurance industry.<sup>20</sup> This relatively rigid framework fits with the narrow interpretations of the “business of insurance” for the purposes of ERISA preemption exemptions in several earlier Supreme Court cases.<sup>21</sup>

Over twenty years after *Metropolitan Life*, however, the Supreme Court revised its approach, making “a clean break from the McCarran-Ferguson factors.”<sup>22</sup> Instead, the Supreme Court held that a state law qualifies for an ERISA pre-emption exemption on insurance grounds if it is: (1) specifically directed towards entities engaged in insurance, and (2) substantially affects the risk pooling arrangement between the insurer and the insured.<sup>23</sup> This open-ended, two-step process not only follows Congress’s desire to have the states regulate insurance companies, but demonstrates the Supreme Court “loosening the tight grip on what is considered a state insurance regulation.”<sup>24</sup>

#### *B. Exclusion of Insurance Companies from the Federal Rules of Bankruptcy*

Historically, there has been no original or exclusive mention of insurance companies in the Federal Rules of Bankruptcy Procedure or the Code. Congress’s power to regulate bankruptcy originates in the Constitution, which declares that Congress shall have the power to establish “uniform Laws on the subject of Bankruptcies throughout the United States.”<sup>25</sup> After several short-lived and ineffective attempts at establishing uniform federal bankruptcy provisions, Congress passed the Bankruptcy Act of 1867 in the turmoil that followed the Panic of 1857 and the American Civil War.<sup>26</sup> The Bankruptcy Act

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<sup>20</sup> 15 U.S.C. § 1011 (2012); *Metropolitan Life Ins. Co. v. Mass.*, 471 U.S. 724, 743 (1985) (quoting *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982)).

<sup>21</sup> See *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979); *Union Labor Life Ins. Co. v. Pireno* 458 U.S. 119 (1982).

<sup>22</sup> *Kentucky Ass’n of Health Plans v. Miller*, 538 U.S. 329, 341 (2003).

<sup>23</sup> *Id.* at 341–42.

<sup>24</sup> Matthew G. Vansuch, *Not Just Old Wine in New Bottles: Kentucky Ass’n of Health Plans, Inc. v. Miller Bottles a New Test for State Regulation of Insurance*, 38 AKRON L. REV. 253, 265 (2005).

<sup>25</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>26</sup> See Charles Jordan Tabb, *The History Of The Bankruptcy Laws In The United States*, 3 AM. BANKR. INST. L. REV. 5, 19 (1995); Act of March 2, 1867, ch. 176, 14 Stat. 517, *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99 (1878).

of 1867 applied to insurance companies,<sup>27</sup> but the 1898 Bankruptcy Act's reworking of bankruptcy law did not include insurance companies in its list of eligible businesses and corporations.<sup>28</sup>

Twelve years later, a 1910 amendment added language allowing insurance companies to be eligible to file for bankruptcy.<sup>29</sup> Bankruptcy laws were revised yet again in the 1938 Chandler Act, which established the chapters that categorized types of bankruptcy over the next forty years.<sup>30</sup> The next major relevant development occurred in 1944's *United States v. South-Eastern Underwriters Ass'n*, where the Supreme Court reversed *Paul v. Virginia*<sup>31</sup> to hold that the insurance industry is engaged in interstate commerce.<sup>32</sup>

The decision to hold insurance industry practices as interstate commerce prompted the National Association of Insurance Commissioners to push for the passage of the McCarran-Ferguson Act.<sup>33</sup> In reversing *Paul v. Virginia*, the Supreme Court revisited the earliest argument in favor of excluding insurance companies from federal regulation: that insurance contracts are not an item in commerce.<sup>34</sup> By holding that insurance contracts are interstate commerce in *United States v. South-Eastern Underwriters Ass'n*, the Supreme Court upheld the validity of criminal indictments made against two hundred companies and twenty-seven individuals for violations of the Sherman Antitrust Act,<sup>35</sup> allowing the Act to apply to insurance company practices.<sup>36</sup> Both insurance companies and state insurance regulators rallied in opposition to the decision. Insurance companies rallied to avoid antitrust liability and state insurance regulators wanted to retain power in notwithstanding the ruling.<sup>37</sup>

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<sup>27</sup> Act of March 2, 1867, ch. 176, 14 Stat. 517, *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99 (1878).

<sup>28</sup> See Laura S. McAlister, *The Inefficiencies of Exclusion: the Importance of Including Insurance Companies in The Bankruptcy Code*, 24 EMORY BANKR. DEV. J. 129, 135 (2008); Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).

<sup>29</sup> See McAlister, *supra* note 28; Act of June 25, 1910, ch. 412, 36 Stat. 838 (1910).

<sup>30</sup> See Tabb, *supra* note 26, at 29; Act of June 22, 1938, 52 Stat. 840 (1938).

<sup>31</sup> *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869).

<sup>32</sup> *South-Eastern Underwriters Ass'n.*, 322 U.S. 533.

<sup>33</sup> See Naujoks, *supra* note 10; 75 NAIC, *supra* note 10; 76 NAIC, *supra* note 10; 15 U.S.C. § 1011 (2012).

<sup>34</sup> See Frank P. Darr, *Federal Claims in Insurance Insolvencies*, 25 TORT & INS. L.J. 601, 604 (1989–1990); *Paul*, 75 U.S. (8 Wall.) 168.

<sup>35</sup> 15 U.S.C. §§ 1–7 (1890).

<sup>36</sup> *South-Eastern Underwriters Ass'n.*, 322 U.S. at 534.

<sup>37</sup> See 15 U.S.C. § 1011 (2012); Darr, *supra* note 34.

The Congressional record indicates that in passing the McCarran-Ferguson Act, Congress aimed to avoid interference with state policy and believed that states were better equipped to handle the localized nature of the insurance industry because states already maintained appropriate regulatory systems.<sup>38</sup> While Congress may have been more concerned with the effects of federal antitrust enforcement than maintaining state regulatory authority,<sup>39</sup> the law that it passed still broadly declared that “the continued regulation and taxation by the several States of the business of insurance is in the public interest.”<sup>40</sup> Notably, the McCarran-Ferguson Act only gave states control over the regulation of “the business of insurance.”<sup>41</sup>

Finally, the Bankruptcy Reform Act of 1978<sup>42</sup> established national bankruptcy guidelines that, with plenty of amendments and revisions, prevail today as the Code.<sup>43</sup> The Code excludes insurance companies, but does so in a roundabout manner.<sup>44</sup> For example, the Code lists insurance companies as ineligible for chapter 7 liquidation proceedings.<sup>45</sup> Insurance companies do not fit the qualifications for bankruptcy under chapter 9, which is intended for municipalities.<sup>46</sup> Because an insurance company is not a railroad, a person that may be a debtor under chapter 7, an uninsured state member bank, or a corporation under 25A of the Federal Reserve Act, it is not eligible for bankruptcy under chapter 11.<sup>47</sup> Similarly, insurance companies do not meet the requirements for eligibility under chapters 12 (for farmers or fishermen) or 13 (for individuals with regular income).<sup>48</sup>

With insurance companies entirely excluded from the Code, each state has its own insurance regulatory scheme to address their insolvencies.<sup>49</sup> States

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<sup>38</sup> See Linda M. Lent, *McCarran-Ferguson in Perspective*, 48 INS. COUNSEL J. 411, 412 (1981).

<sup>39</sup> See Darr, *supra* note 34, at 607.

<sup>40</sup> 15 U.S.C. § 1011 (2012).

<sup>41</sup> See Lent, *supra* note 38, at 413; *South-Eastern Underwriters Ass’n*, 322 U.S. 533 (discussing how the limitations of “the business of insurance” imply that *Paul v. Virginia* may not be entirely overruled); see also *SEC v. Nat’l Sec.*, 393 U.S. 453, 460 (1969) (“Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the business of insurance.”)

<sup>42</sup> Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, §101 (1978).

<sup>43</sup> 11 U.S.C. §§ 101–1532 (2012). See generally Kenneth N. Klee, *Legislative History of The New Bankruptcy Law*, 28 DEPAUL L. REV. 941 (1979).

<sup>44</sup> See generally 11 U.S.C. § 109 (2012).

<sup>45</sup> *Id.* § 109 (b)(2).

<sup>46</sup> *Id.* § 109 (c)(1).

<sup>47</sup> *Id.* § 109 (d).

<sup>48</sup> *Id.* §§ 109 (f), (e).

<sup>49</sup> See Karl L. Rubinstein, *The Legal Standing of an Insurance Insolvency Receiver: When the Shoe Doesn’t Fit*, 10 CONN. INS. L.J. 309, 317 (2004).



often develop these schemes to resemble models created by the National Association of Insurance Commissioners.<sup>50</sup> The various statutes require that a Commissioner be appointed to oversee the insolvent company's estate in unique processes parallel to yet those proscribed by the Code.<sup>51</sup>

### C. *The Burford Abstention Doctrine*

Abstention doctrines are exceptions to otherwise mandatory federal jurisdiction requirements that determine when a federal court should refrain from hearing a case in favor of allowing the dispute to resolve in a state proceeding.<sup>52</sup> The term "abstention" was first applied in this context in 1941 in *Railroad Commission of Texas v. Pullman Company*.<sup>53</sup> *Burford* abstention is merely one of "four primary abstention doctrines" that "[t]he Supreme Court has recognized,"<sup>54</sup> and certain federal codes even address abstention directly.<sup>55</sup> *Burford* abstention allows a federal court to abstain from exercising its jurisdiction in deference to complex state administrative procedures.<sup>56</sup> Due to its complicated interpretation and application, the doctrine has been called "troublesome and enigmatic."<sup>57</sup>

The genesis of the *Burford* abstention doctrine arises from a dispute over a state's issuance of oil drilling permits. The Supreme Court heard *Burford v. Sun Oil* after an appeal of a decision by the Railroad Commission of Texas to

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<sup>50</sup> *See id.*

<sup>51</sup> *See id.* at 317–18; e.g., Cal. Ins. Code §1037 (2016); O.C.G.A. § 33-37-13 (2016); *see also* McAlister, *supra* note 28, at 130–36 (describing typical state insurance insolvency proceedings).

<sup>52</sup> Gordon G. Young, *Federal Court Abstention and State Administration Law from Burford to Ankenbrandt: Fifty Years of Judicial Federalism under Burford v. Sun Oil Co. and Kindred Doctrines*, 42 DEPAUL L. REV. 859, 862–63 (1993).

<sup>53</sup> *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941) ("These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, exercising a wise discretion, restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the smooth working of the federal judiciary.") (internal quotation marks omitted); *see* Young, *supra* note 52, at 863.

<sup>54</sup> Michael Ashley Stein, *The Domestic Relations Exception To Federal Jurisdiction: Rethinking An Unsettled Federal Courts Doctrine*, 36 B.C.L. REV. 669, 694–95 (1994–1995) (identifying *Pullman*, *Burford*, *Younger*, and *Colorado River* abstention as the most prominent abstention doctrines recognized by the Supreme Court); *see* Young, *supra* note 52, at 868 (citing the same four "major varieties of abstention" and adding a fifth, *Thibodaux* abstention).

<sup>55</sup> 28 U.S.C. § 1334(c)(2) (2012) (addressing mandatory abstention); 28 U.S.C. § 1452(b) (2012) (addressing equitable abstention). Note that both provisions address situations not related to *Burford* abstention in the context of insurance insolvency proceedings, as both statutes apply to situations covered by the Code.

<sup>56</sup> *See* Stephen W. Sather, *Resolving Conflicts Between Bankruptcy and Administrative Law*, 11 TEX. TECH. ADMIN. L.J. 267, 272 (2010).

<sup>57</sup> Young, *supra* note 52, at 863.

grant the right to drill four oil wells to a small oil company.<sup>58</sup> Sun Oil Co. alleged that the Railroad Commission violated their due process rights under the Fourteenth Amendment by unfairly denying them the right to drill the wells, and brought the suit to federal court through federal question and diversity of citizenship.<sup>59</sup> The Court cited “confusion,” “[d]elay, misunderstanding of local law, and needless conflict with state policy” as resulting from a federal court’s intrusion into a “well organized system of regulation and review which the Texas statutes provide.”<sup>60</sup> The Court concluded that given these factors and the expertise of the state agency, “a sound respect for the independence of state action requires the federal equity court to stay its hand.”<sup>61</sup> The Court abstained from hearing the case, despite the fact that, as the Court noted thirty-three years later, “the reasonableness of the permit . . . was not of transcendent importance.”<sup>62</sup>

The *Burford* abstention doctrine has been commented on and altered by the Supreme Court in several subsequent decisions.<sup>63</sup> In *County of Allegheny v. Frank Mashuda Co.*, the Court generally limited the reach of abstention doctrines:

The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.<sup>64</sup>

The Court incorporated the “extraordinary and narrow exception” language from *Allegheny* into its holding in *Colorado River Water Conservation Dist. v. United States*.<sup>65</sup> In *Colorado River*, the Court held that no previously recognized abstention doctrine fit with the facts of the case, but that principles

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<sup>58</sup> *Burford*, 319 U.S. 315.

<sup>59</sup> *Id.* at 315.

<sup>60</sup> *Id.* at 329.

<sup>61</sup> *Id.* at 334.

<sup>62</sup> *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

<sup>63</sup> *See County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188–89 (1959); *Colorado River Water Conservation Dist.*, 424 U.S. at 813–19 (1976); *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989); *Quackenbush*, 517 U.S. at 728.

<sup>64</sup> *County of Allegheny*, 360 U.S. at 188–89.

<sup>65</sup> *Colorado River Water Conservation Dist.*, 424 U.S. 800.

of avoiding duplicitous litigation and wisely allocating judicial resources merited creating and applying a new one.<sup>66</sup>

The Court continued to alter its approach to *Burford* abstention. In *New Orleans Public Service, Inc. v. Council of New Orleans* (hereinafter “*NOPSI*”), the Court refused to apply *Burford* abstention on the grounds that the case did not involve a state law claim or the assertion of a federal claim being entangled with a state claim.<sup>67</sup> The Court incorporated language from *Colorado River* to create a new definition of *Burford* abstention:

Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are “difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar”; or (2) where the “exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.”<sup>68</sup>

While some courts have interpreted the *NOPSI* decision as sharply limiting the applicability of the *Burford* doctrine, other courts disagree.<sup>69</sup> Lastly, in *Quackenbush v. Allstate Insurance Co.*, the Supreme Court directly applied language from *Allegheny* and *Colorado River* to characterize *Burford* abstention as only an “extraordinary and narrow exception to a district court’s duty to adjudicate a controversy properly before it.”<sup>70</sup> Thus, the *NOPSI*

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<sup>66</sup> *Id.* at 813–19.

<sup>67</sup> *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350 (1989).

<sup>68</sup> *Id.* at 361 (quoting *Colorado River Water Conservation Dist.*, 424 U.S. at 813–15); see also HENRY MELVIN HART, JR. AND HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, 1077–79 (6th. Ed. 2009) (suggesting that the court’s *Burford* formulation applies when a state court works as a de facto partner of a state administrative agency in developing regulatory policy).

<sup>69</sup> See *Sevigny v. Emp’rs. Ins. of Wausau*, 411 F.3d 24, 27 (1st Cir. 2005) (“*NOPSI* also contains a general reformulation of *Burford*, often quoted, that can be read expansively or narrowly and is ultimately ambiguous”). Compare *Fragoso*, 991 F.2d at 882 (1st Cir. 1993) (“*NOPSI* cabins the operation of the *Burford* doctrine. Post-*NOPSI* *Burford* applies only in narrowly circumscribed situations where deference to a state’s administrative processes for the determination of complex, policy-laden, state-law issues would serve a significant local interest and would render federal-court review inappropriate.”), and *University of Md. v. Peat Marwick Main & Co.*, 923 F.2d 265, 272 (“It is clear that, after *NOPSI*, federal courts should be more wary of extending the scope of *Burford* abstention.”), with *Clark v. Fitzgibbons*, 105 F.3d 1049 (5th Cir. 1997) (holding that the *NOPSI* decision does not abrogate the rule favoring *Burford* abstention in deference to state insurance insolvency proceedings).

<sup>70</sup> *Quackenbush*, 517 U.S. at 728 (1996) (quoting *Colorado River Water Conservation Dist.*, 424 U.S. at 813) (quoting *County of Allegheny*, 360 U.S. at 188–89).

definition, qualified by *Quackenbush*, governs the application of the *Burford* abstention doctrine today.<sup>71</sup>

*D. Burford Abstention in the Equity Context*

In *Burford v. Sun Oil*, the majority opinion specified that under the circumstances of the case, “sound respect for the independence of state action requires the federal equity court to stay its hand.”<sup>72</sup> Courts have debated whether the presence of a “federal equity court” in this sentence cabins *Burford* abstention to instances where the court can only provide equitable remedies.<sup>73</sup> The Supreme Court addressed this issue extensively in the context of various abstention doctrines in *Quackenbush*.<sup>74</sup> The Court summarized its conclusion as follows:

We have thus held that in cases where the relief being sought is equitable in nature or otherwise discretionary, federal courts not only have the power to stay the action based on abstention principles, but can also, in otherwise appropriate circumstances, decline to exercise jurisdiction altogether by either dismissing the suit or remanding it to state court. By contrast, while we have held that federal courts may stay actions for damages based on abstention principles, we have not held that those principles support the outright dismissal or remand of damages actions.<sup>75</sup>

Thus, the Court in *Quackenbush* clarified that a federal court sitting in equity can invoke an abstention doctrine to decline to exercise jurisdiction, dismiss a suit, or remand the suit to a state forum. By contrast, a federal court in a damages action may stay an action on abstention grounds, but not dismiss or remand one. This basic framework functions as a foundation for more complex cases featuring claims for both equitable relief and monetary damages, where

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<sup>71</sup> See *New Orleans Pub. Serv., Inc.*, 491 U.S. 350; *Quackenbush*, 517 U.S. at 728 (1996) (quoting *Colorado River Water Conservation Dist.*, 424 U.S. at 813) (quoting *County of Allegheny*, 360 U.S. at 188–89).

<sup>72</sup> *Burford*, 319 U.S. at 334 (emphasis added).

<sup>73</sup> Compare *Lac D’Amiante du Quebec, Ltee*, 864 F.2d at 1045 (*Burford* abstention appropriate in case seeking declaratory relief), and *Brandenburg*, 859 F.2d at 1192 n.17 (*Burford* abstention appropriate in action for damages), and *Wolfson*, 51 F.3d at 147 (same), with *Fragoso*, 991 F.2d at 882 (*Burford* abstention inappropriate in a torts action), *University of Md.*, 923 F.2d at 272 (citing *New Orleans Pub. Serv., Inc.*, 491 U.S. 350) (*NOPSI* limits the application of *Burford* abstention when the court is not sitting in equity), and *Baltimore Bank for Coops. v. Farmer’s Cheese Coop.*, 583 F.2d 104, 111 (3rd Cir. 1978).

<sup>74</sup> *Quackenbush*, 517 U.S. at 721–27.

<sup>75</sup> *Id.* at 721.

the prominence of the equitable claim favors abstaining and the prominence of monetary damages supports not abstaining.<sup>76</sup>

## II. ANALYSIS

This section will explore the necessity of a uniform set of criteria for determining when it is appropriate to apply the *Burford* abstention doctrine. The first subsection will identify the significance of *Burford* abstention to state insurance insolvency proceedings. The second subsection will dispute claims that *NOPSI* and *Quackenbush* have limited the scope of *Burford* abstention. The third subsection will examine competing formulas for determining the application of *Burford* abstention developed by the Fifth Circuit and the Tenth Circuit. The fourth subsection will propose a formulation for judges to consider when determining whether or not to abstain on *Burford* grounds that echoes and expands upon the concerns expressed by the Court of Appeals for the Tenth Circuit in *Grimes*.<sup>77</sup> This fourth subsection will examine the proposed criteria as they relate to the policy concerns behind the *Burford* abstention doctrine, the reasons for the exclusion of insurance companies from the Code, and the text of relevant laws and codes. The fourth subsection will also contrast the proposed set of factors with sets developed by other courts, particularly the Fifth Circuit's *Wilson* formulation.<sup>78</sup>

### A. *The Role of States in Bankruptcy and Burford in the State Insurance Insolvency Context*

Before the ratification of the Constitution, the States (as they existed at the time) passed a wide variety of short-term bankruptcy laws of varying types and effectiveness.<sup>79</sup> The language of the Constitution appears to counter this disparate situation by granting widespread power to the federal government to

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<sup>76</sup> See, e.g., *Wolfson*, 51 F.3d at 147 (“No doubt abstention is less apt to be appropriate when the federal plaintiff seeks money damages, but we do not read the Supreme Court’s abstention jurisprudence as completely foreclosing abstention in money damage cases.”); see also *General Glass Indus. Corp. v. Monsour Med. Found.*, 973 F.2d 197 (3rd Cir. 1992) (in a case involving monetary damages and a party involved in a state insurance insolvency proceeding, vacating a lower court’s decision to dismiss and remand on *Burford* grounds, but imposing a stay on *Burford* grounds).

<sup>77</sup> *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 705 (10th Cir. 1988).

<sup>78</sup> *Wilson v. Valley Elec. Membership Corp.*, 8 F.3d 311, 314–16 (5th Cir. 1993).

<sup>79</sup> See BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE*, 59–61 (2002) (describing pre-Constitution bankruptcy laws in New York, Rhode Island, and Connecticut); Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 518–26 (1996) (discussing the different approaches adopted by all thirteen states before the adoption and ratification of the Constitution).

legislate in the area of bankruptcy, as it allows Congress to establish “*uniform* Laws on the subject of Bankruptcies throughout the United States.”<sup>80</sup> However, federal bankruptcy laws have historically carved out areas where the state retains control,<sup>81</sup> and the Supreme Court has affirmed these exceptions against claims that they violated the federal government’s power to set uniform laws on the subject.<sup>82</sup> Today, the clear exclusion of insurance companies from the Code indicates a policy of allowing states to maintain control over their insolvency proceedings.<sup>83</sup> The Code may abstractly indicate a Congressional desire for uniformity in most circumstances, but, in practice, the results of filings for bankruptcy have often varied enormously depending on the state.<sup>84</sup> The preservation of state control over insurance insolvency proceedings through the application of *Burford* abstention fits within this fractured framework.

Nonetheless, the adoption of a unified formula for choosing when to apply *Burford* abstention would provide desirable predictability, especially if such a formula emphasized the policy goals behind the doctrine. Nowhere would such a framework be more helpful than in the realm of federal cases involving a party undergoing a state insurance insolvency proceeding, where similar facts have often resulted in different decisions regarding *Burford* abstention.<sup>85</sup> As the Court of Appeals for the Fifth Circuit pointed out in *Callon Petroleum Co. v. Frontier Insurance Co.*, “Although *Burford* abstention is generally considered the exception rather than the rule, the insurance insolvency context presents the classic example of the doctrine’s goal of preventing ‘needless conflict with state policy.’”<sup>86</sup>

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<sup>80</sup> U.S. CONST. art. I, § 8, cl. 4 (emphasis added).

<sup>81</sup> See Plank, *supra* note 79, at 558 (“The concern about uniformity is nonsense. Under both the Bankruptcy Act of 1898 and the Bankruptcy Code of 1978, debtors could exempt certain items of their property from the claims of creditors. These exemptions are based on the law of the debtors’ state. These state law exemptions were and are wildly different.”).

<sup>82</sup> See, e.g., *Hanover Nat’l Bank v. Moyses*, 186 U.S. 181 (1902); *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

<sup>83</sup> 11 U.S.C. § 109 (2012).

<sup>84</sup> See generally Daniel A. Austin, *Bankruptcy and the Myth of “Uniform Laws”*, 42 SETON HALL L. REV. 1081 (2012) (discussing how the state and local laws prevent the U.S. Bankruptcy Code and Congress from establishing truly uniform bankruptcy laws); see also Ryan Mallone, *When Opting Out is the Only Option: Protecting Small Business Debtors in Bankruptcy*, 4 WM. & MARY BUS. L. REV. 745, 747–49 (2013) (describing how many states have adopted unique sets of exemptions and “opted out” of the exemptions list in 11 U.S.C. § 522 of the Code).

<sup>85</sup> Compare, e.g., Clark, 105 F.3d 1049, with Fragoso, 991 F.2d 878.

<sup>86</sup> *Callon Petroleum Co. v. Frontier Ins. Co.*, 351 F.3d 204, 209 (5th Cir. 2003) (quoting *Burford*, 319 U.S. at 327). See generally Michael A. Knoerzer, *Flagging The Obligation: Federal Courts’ Abstention in*

Arguments about the appropriateness of *Burford* abstention arise so often in the context of cases involving a party undergoing a state insurance insolvency proceeding that the Court of Appeals for the Eighth Circuit sorted them into three specific categories.<sup>87</sup> The first consists of suits filed by an insolvent insurer's policyholders against a third party where a verdict against the third party could somehow impede the ability of the receiver of the insolvent insurer (often intervening in the case) to recover on behalf of the insurer's estate.<sup>88</sup> The second includes cases filed by an insolvent insurer or its receiver where recovery would benefit the insolvent's estate.<sup>89</sup> The third category consists of cases filed by creditors, including policyholders and policy beneficiaries, against an insolvent insurance company.<sup>90</sup> Despite delineating these categories, the Court of Appeals for the Eighth Circuit emphasized the importance of eschewing "discrete mechanical tests" in favor of carefully balancing "considerations of federalism, comity, and judicial administration" as "[a]bstention is inherently a fact-specific inquiry."<sup>91</sup>

## B. *Burford Post-NOPSI and Quackenbush*

### 1. *Burford and NOPSI*

The Supreme Court's decisions in *NOPSI* and *Quackenbush* have raised questions about the viability of the *Burford* abstention doctrine.<sup>92</sup> The immensely complex facts of *NOPSI* relate to a dispute between respondent New Orleans City Council and several jointly-owned companies, including petitioner New Orleans Public Service, Inc.<sup>93</sup> The New Orleans City Council denied Petitioner's request for a rate increase that would have offset payments that the Federal Energy Regulatory Commission had forced petitioner to make to help fund a nuclear reactor.<sup>94</sup> A series of lawsuits followed, all dismissed on

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*Favor of State Rehabilitation And Liquidation Proceedings*, 28 TORT & INS. L.J. 837 (1993) (discussing how abstention is unusual in cases where a party is not an insolvent insurer or its statutory representative).

<sup>87</sup> Wolfson, 51 F.3d at 145.

<sup>88</sup> *Id.*; see, e.g., *General Glass Indus. Corp.*, 973 F.2d 197 (*Burford* abstention appropriate where a verdict against defendant insurance company would disrupt insolvent insurer receiver's efforts to recover funds).

<sup>89</sup> Wolfson, 51 F.3d at 145.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *New Orleans Pub. Serv., Inc.*, 491 U.S. 350; *Quackenbush*, 517 U.S. 706.

<sup>93</sup> *New Orleans Pub. Serv., Inc.*, 491 U.S. at 352–53.

<sup>94</sup> *Id.* at 350.

the grounds of ripeness, *Burford* abstention, or a different abstention doctrine.<sup>95</sup>

When the dispute finally reached the Supreme Court, Justice Scalia, writing for a unanimous Court,<sup>96</sup> found no abstention doctrine to apply and reversed.<sup>97</sup> Scalia refused to apply *Younger* abstention on the grounds that that doctrine, which originated in a criminal case, did not extend to the type of actions taken by the New Orleans City Council.<sup>98</sup> As to *Burford*, the Court introduced a new definition for the *Burford* doctrine<sup>99</sup> and then refused to apply it on the grounds that the facts of the case required an inquiry only into the “four corners of the Council’s retail rate order.”<sup>100</sup> Such an inquiry would not, the Court argued, “disrupt state resolution of distinctively local regulatory facts or policies.”<sup>101</sup>

Justice Blackmun’s concurrence in *NOPSI* marks the first of many concerns about the majority opinion’s definition of *Burford* abstention limiting its scope.<sup>102</sup> As Justice Blackmun wrote, “I find, however, that the majority’s understanding of *Burford* abstention is much narrower than my own in respects not relevant to the disposition of this case.”<sup>103</sup> Four years later, the Court of Appeals for the First Circuit, while declining to apply *Burford* abstention, expressed similar concerns: “*NOPSI* cabins the operation of the *Burford* doctrine. Post-*NOPSI* *Burford* applies only in narrowly circumscribed situations where deference to a state’s administrative processes for the determination of complex, policy-laden, state-law issues would serve a significant local interest and would render federal-court review inappropriate.”<sup>104</sup> On the other hand, the Court of Appeals for the Fifth Circuit

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<sup>95</sup> *Id.* at 352–58.

<sup>96</sup> Justices Rehnquist, Marshall, Blackmun, and Brennan filed or joined concurring opinions.

<sup>97</sup> *New Orleans Pub. Serv., Inc.*, 491 U.S. at 373.

<sup>98</sup> *Id.* at 367–68 (“Respondents’ case for abstention . . . requires, however, that the Council proceeding be the sort of proceeding entitled to *Younger* treatment. We think it is not.”).

<sup>99</sup> *Id.* at 361 (“Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are ‘difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar’; or (2) where the ‘exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.’”) (quoting *Colorado River Conservation Dist.*, 424 U.S. at 814.); see *Quackenbush*, 517 U.S. at 726–27 (quoting the same passage).

<sup>100</sup> *New Orleans Pub. Serv., Inc.*, 491 U.S. at 362–63.

<sup>101</sup> *Id.* at 363–64.

<sup>102</sup> *Id.* at 374 (Blackmun, J., concurring).

<sup>103</sup> *Id.* (Blackmun, J., concurring).

<sup>104</sup> *Fragoso*, 991 F.2d at 882.



argued that *NOPSI* “has not abrogated the rule favoring abstention in deference to state insurance insolvency or liquidation proceedings” and invoked *Burford* abstention in a case involving an insurance company undergoing a state insolvency proceeding.<sup>105</sup>

The First Circuit, in *Sevigny v. Employers Insurance of Wausau*, best addresses the actual definition presented in *NOPSI*: “*NOPSI* also contains a general reformulation of *Burford*, often quoted, that can be read expansively or narrowly and is ultimately ambiguous.”<sup>106</sup> Indeed, the *NOPSI* definition does little to limit *Burford*’s scope. The initial policy concerns expressed in *Burford v. Sun Oil* related not just to the mere set of facts immediately before the court, but to the larger goal of avoiding the establishment of a precedent of federal courts second-guessing the decisions of the highly specialized Texas Railroad Commission.<sup>107</sup> If parties knew that a decision by the Commission could be promptly reversed by a federal court lacking the Commission’s expert knowledge, then the policy goals of the State of Texas in the substantially important arena of determining the issuance of oil well drilling permits would be impeded.<sup>108</sup>

Ultimately, the *NOPSI* definition encapsulates these concerns by noting that *Burford* is appropriate for cases involving either questions not only of state law, but also that “transcend the result in the case then at bar” or situations where federal review would disrupt a state’s attempt to “establish a coherent policy with respect to a matter of substantial public concern.”<sup>109</sup> The administrative efforts undertaken by each state to create a system that handles insurance insolvency proceedings represent precisely the kind of “coherent policy with respect to a matter of substantial public concern” described in *NOPSI*.<sup>110</sup>

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<sup>105</sup> Clark, 105 F.3d 1049 (holding that the *NOPSI* decision does not abrogate the rule favoring *Burford* abstention in deference to state insurance insolvency proceedings).

<sup>106</sup> *Sevigny*, 411 F.3d at 27.

<sup>107</sup> See *Burford*, 319 U.S. at 332–34 (“Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts.”).

<sup>108</sup> See *id.* (“These questions of regulation of the industry by the state administrative agency, whether involving gas or oil prorationing programs or Rule 37 cases, so clearly involves basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them.”)

<sup>109</sup> *New Orleans Pub. Serv., Inc.*, 491 U.S. at 361.

<sup>110</sup> *Id.*; see also Clark, 105 F.3d at 1052 (dismissing party’s argument that *NOPSI* curtails *Burford* abstention in the context of insurance insolvency).

## 2. *Burford and Quackenbush*

In *Quackenbush v. Allstate Insurance Co.*, the California Insurance Commissioner sued Allstate Insurance Company for damages from an alleged breach of reinsurance agreements.<sup>111</sup> After Allstate removed the case to federal court, the California Insurance Commissioner argued to the District Court that the case should be remanded to state court under *Burford* abstention due to the significance of the case to California's regulation of the insurance industry.<sup>112</sup> After the District Court invoked *Burford* abstention, Allstate appealed to the Court of Appeals for the Ninth Circuit, which vacated the District Court's decision on the grounds that *Burford* abstention only applies to equitable, rather than damages, actions.<sup>113</sup>

The first issue before the Supreme Court was whether a district court's decision to invoke *Burford* abstention was immediately appealable as a final order.<sup>114</sup> In a unanimous decision,<sup>115</sup> the Court held that the *Burford* abstention was appealable, but that *Burford* abstention cannot be invoked to dismiss or remand in a damages action (though it can be invoked to stay a damages action).<sup>116</sup> Most significantly, *Quackenbush* characterized *Burford* abstention as only an "extraordinary and narrow exception to a district court's duty to adjudicate a controversy properly before it."<sup>117</sup>

Like *NOPSI*, *Quackenbush* appears on its surface to limit the scope of *Burford* abstention, but it largely only serves to clarify it. While finally applying the "extraordinary and narrow exception"<sup>118</sup> language to the *Burford* doctrine solidifies its status as the exception rather than the rule, this language has been connected to abstention doctrines since 1959.<sup>119</sup> Further, the Court's holding in *Quackenbush* that *Burford* abstention can only be used to stay,

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<sup>111</sup> *Quackenbush*, 517 U.S. at 709.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 711–12.

<sup>114</sup> *Id.* at 730–31 ("Because this was a damages action, we conclude that the District Court's remand order was an unwarranted application of the *Burford* doctrine.").

<sup>115</sup> Justices Scalia and Kennedy filed concurring opinions, with Justice Kennedy arguing that the possibility of invoking *Burford* abstention in a damages action should be left open and Scalia responding that the majority decision precluded such a possibility. *Id.* at 731–34.

<sup>116</sup> *Id.* at 730–31 (holding that "... given the situation the District Court faced in this case, a stay order might have been appropriate . . ." but "federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary.").

<sup>117</sup> *Id.* at 728 (quoting *Colorado River Water Conservation Dist.*, 424 U.S. at 813) (quoting *County of Allegheny*, 360 U.S. at 188–89).

<sup>118</sup> *Id.*

<sup>119</sup> *See County of Allegheny*, 360 U.S. at 188–89.

rather than dismiss or remand, a damages action appears at first to be a significantly more severe limitation than it actually has proven to be in practice.<sup>120</sup> Because the issues resolved on the state level typically resemble those that a party wishes to have heard in a federal court, issue preclusion and claim preclusion often prevent a “stayed” federal case from being heard following the resolution of state proceedings.<sup>121</sup> Thus, while *Quackenbush* draws clear boundaries around *Burford* abstention, these lines only intrude slightly into the legal realm that *Burford* had previously inhabited.

### C. Circuit Courts and Burford Tests

In various decisions, circuit courts have developed ad-hoc analytical tests to determine whether to invoke the *Burford* abstention doctrine.<sup>122</sup> In addition, two prominent factor-based tests have been developed on the Court of Appeals level: the *Wilson* factors and the *Grimes* factors.

#### 1. The Wilson Factors

In *Wilson v. Valley Electric Membership Corp.*, the Court of Appeals for the Fifth Circuit developed a five-factor test that was later applied in the insurance insolvency context by the District Court for the Eastern District of Illinois in *Lentz v. Trincharid*.<sup>123</sup> This test requires an analysis of:

- 1) Whether the cause of action arises under federal or state law
- 2) whether the case requires inquiry into unsettled issues of state law, or into local facts
- 3) the importance of the state interest involved
- 4) the state’s need for a coherent policy in that area and
- 5) the presence of a special state forum for judicial review.<sup>124</sup>

The facts of *Wilson* relate to a Louisiana statute that exempted the electric power rates of certain rural cooperatives from the regulatory purview of Louisiana Public Service Commission.<sup>125</sup> After eleven years of the exemption preventing the Louisiana Public Service Commission from regulating these cooperatives, the Supreme Court of Louisiana held the exemption to be

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<sup>120</sup> See Daniel C. Norris, *The Final Frontier of Younger Abstention: The Judiciary’s Abdication of the Federal Court Removal Jurisdiction Statute*, 31 FLA. ST. U.L. REV. 193, 210–14 (2003) (arguing that there is little practical difference between a dismissal and a stay).

<sup>121</sup> See *id.* at 211–12.

<sup>122</sup> See, e.g., *Corcoran*, 842 F.2d 31; *Law Enforcement Ins. Co. v. Corcoran*, 807 F.2d 38 (2nd Cir. 1986); *Bilden v. United Equitable Ins. Co.*, 921 F.2d 822 (8th Cir. 1990).

<sup>123</sup> *Wilson*, 8 F.3d 311; *Lentz*, 730 F. Supp. 2d 567.

<sup>124</sup> *Wilson*, 8 F.3d at 314–17.

<sup>125</sup> *Id.* at 312–13.

unconstitutional.<sup>126</sup> A class action lawsuit was commenced against ten rural electric cooperatives in Louisiana, with the proposed class consisting of customers, shareholders, and members of the cooperatives.<sup>127</sup> The class sought refunds of money spent on increased power rates that the cooperatives charged due to the Louisiana Public Service Commission's failure to regulate them based on its adherence to the newly unconstitutional statute.<sup>128</sup> The defendant cooperatives removed the case to federal court.<sup>129</sup>

The defendant cooperatives moved for summary judgment on the grounds that the decision invalidating the statute<sup>130</sup> should only apply prospectively.<sup>131</sup> At this point, the Louisiana Public Service Commission began a review of the rates charged by one of the cooperatives.<sup>132</sup> The plaintiff class moved for the court to invoke *Burford* abstention to allow the state commission to complete its rate review before ruling on the motion for summary judgment and proceeding with the case.<sup>133</sup> The district court did abstain on *Burford* grounds, leading the defendant to appeal.<sup>134</sup>

In evaluating whether *Burford* abstention should apply, the Court of Appeals for the Fifth Circuit drew from a variety of sources to establish the five-factor test.<sup>135</sup> The court cited *NOPSI* for its first factor, whether or not the cause of action arises under federal or state law.<sup>136</sup> Next, the court drew primarily from *Burford v. Sun Oil* for the remaining four factors: whether the case requires inquiry into unsettled issues of state law or local facts, the importance of the state interest involved, the state's need for a coherent policy in that area, and the presence of a special state forum for judicial review.<sup>137</sup>

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<sup>126</sup> *Id.* at 313; see *Cajun Elec. Power Coop., Inc. v. La. Pub. Serv. Comm'n*, 544 So. 2d 362 (La.) (1989), *cert. denied*, 493 U.S. 991 (1989).

<sup>127</sup> *Wilson*, 8 F.3d at 312–13. See generally *Wilson v. Valley Elec. Membership Corp.*, 1992 U.S. Dist. LEXIS 13493 (1992).

<sup>128</sup> *Wilson*, 8 F.3d at 313.

<sup>129</sup> *Id.*

<sup>130</sup> See *Cajun Elec. Power Coop., Inc.*, 544 So. 2d 362.

<sup>131</sup> *Wilson*, 8 F.3d at 313.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 314–16.

<sup>136</sup> *Id.* at 314 (citing *New Orleans Pub. Serv., Inc.*, 491 U.S. at 361).

<sup>137</sup> *Id.* (citing *Burford*, 319 U.S. 315); see *Alabama Pub. Serv. Comm'n v. S. R. Co.*, 341 U.S. 341 (1951).

The Court of Appeals for the Fifth Circuit applied the factors to the case.<sup>138</sup> The court held that the issues, whether the decision striking down the statute should apply retroactively and, if so, whether it invalidates prior rate increases, were purely of state law.<sup>139</sup> As to the second factor, the court noted that deciding the case would require delving into an area of state law that is reasonably settled, but also highly complex and localized.<sup>140</sup> The court found the importance of the state interest to also favor abstention, given that utility regulation is a significant state function.<sup>141</sup> The court also determined that the state does have a need for coherent policy in the area of retroactive application of regulation of rural cooperatives, strengthening the case against federal intervention.<sup>142</sup> Finally, the court held that Louisiana had a special forum for rate cases, resulting in the final factor also supporting abstention.<sup>143</sup> With all five factors favoring *Burford* abstention, the Fifth Circuit Court of Appeals ultimately affirmed the lower court decision to invoke it.<sup>144</sup>

*a. Application of the Wilson Factors*

In *Lentz v. Trincharde*, the District Court for the Eastern District of Louisiana incorporated the *Wilson* factors for *Burford* abstention into an analysis of a case in the insurance insolvency context.<sup>145</sup> The facts of the case relate to a detective, Gary Hale, who was insured by American Druggists Insurance Company (ADIC).<sup>146</sup> ADIC was insured by Northwestern National Insurance Company (NNIC), which assumed responsibility for Hale's policy when ADIC became insolvent.<sup>147</sup> In 1991, an individual sued Hale on the basis of a wrongful murder conviction.<sup>148</sup> The resulting multi-million dollar judgment forced Hale into involuntary bankruptcy in 2001.<sup>149</sup> The trustee appointed to oversee Hale's bankruptcy estate sued NNIC under Louisiana law

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<sup>138</sup> *Id.* at 314–16.

<sup>139</sup> *Id.* at 314.

<sup>140</sup> *Id.* at 315 (noting that this state law analysis would be “highly localized, specialized, judgmental, and perhaps partisan”).

<sup>141</sup> *Id.* (quoting *New Orleans Pub. Serv., Inc.* 491 U.S. at 365)

<sup>142</sup> *Id.* at 315–16.

<sup>143</sup> *Id.* at 316.

<sup>144</sup> *Id.*

<sup>145</sup> *Lentz*, 730 F. Supp. 2d 567.

<sup>146</sup> *Id.* at 571.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 571–72.

citing alleged violations of NNIC's duty of good faith and fair dealing to Hale.<sup>150</sup>

The case remained unresolved as of 2009 when NNIC entered into insolvency proceedings in Wisconsin.<sup>151</sup> Several new defendants, referred to as the "AK defendants," were also added to the case.<sup>152</sup> The Hale estate's trustee amended the complaint to claim that NNIC and the AK defendants were merely "all alter egos of each other" and are all liable for damages against Hale.<sup>153</sup> Hale's estate also sought to annul a transfer of funds pursuant to the order of a Wisconsin state court between NNIC and one of the AK defendants.<sup>154</sup> The AK defendants filed motions to dismiss the plaintiff's complaints and, alternatively, to stay plaintiff's claims pending the resolution of NNIC's state court rehabilitation proceedings with ADIC in Wisconsin.<sup>155</sup>

The Louisiana Eastern District Court denied NNIC's motions to dismiss and instead opted to analyze the issue under the *Burford* abstention doctrine.<sup>156</sup> The court determined not to abstain under *Burford* through application of the *Wilson* factors.<sup>157</sup> The court found the first factor to favor *Burford* abstention on the ground that the case involved only issues of Wisconsin state law.<sup>158</sup> However, the second factor weighed against *Burford* abstention because NNIC failed to demonstrate that the case involved any unsettled issue of state law.<sup>159</sup> Third, as to the importance of the state interest involved, the court determined that while an important and complex state administrative scheme existed, it would not be frustrated by the resolution of this case.<sup>160</sup>

Additionally, the court found the fourth factor to also weigh against invocation of the *Burford* doctrine because hearing the case would not disrupt the state's goal of implementing a coherent policy for the regulation of

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<sup>150</sup> *Id.* at 572.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 571–72 (describing the "AK defendants" as "Armco Insurance Group, Inc., Armco Financial Services Corporation, AFSG Holdings Company, Inc., AKS Investments, Inc., and AK Steel Corporation").

<sup>153</sup> *Id.* at 572.

<sup>154</sup> *Id.* at 573.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 585 ("Accordingly, NNIC's Rule 12(b)(6) motion and the AK defendants' Rule 12(b)(1) motion are DENIED. Such concerns are better addressed through an analysis of the *Burford* abstention doctrine.").

<sup>157</sup> *Id.* at 587–91; *see Wilson*, 8 F.3d at 314–16.

<sup>158</sup> *Lentz*, 730 F. Supp. 2d at 587.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 588.

insolvent insurers.<sup>161</sup> Notably, the court held that the plaintiff was not attempting to “leapfrog ahead” of other claimants stopped by the state equivalent of an automatic stay and was merely creating one additional claim against an insolvent insurance company.<sup>162</sup> Finally, the court noted that the state had a special forum for judicial review in place, favoring abstention.<sup>163</sup> Based on this analysis, the court decided not to abstain on *Burford* grounds. The court decided not to abstain because, even though courts in this context often abstain on *Burford* grounds, adjudication of this particular case would not substantially interfere with the administration of NNIC’s assets by Wisconsin state authorities through its insolvency proceedings.<sup>164</sup>

## 2. *The Grimes Factors*

The second formulation bears some similarities to the *Wilson* test, but also directly addresses the significance of state control over insurance regulation. The Court of Appeals for the Fifth Circuit developed a four-part approach for determining when to invoke *Burford* abstention in *Grimes v. Crown Life Insurance Co.* that looks at:

Whether (1) the suit is based on a cause of action which is entirely federal, (2) the suit requires the court to determine issues which are directly relevant to the liquidation proceeding or state policy in the regulation of the insurance industry, (3) state procedures indicate a desire to create special state forums to regulate and adjudicate these issues, and (4) difficult or unusual state laws are at issue.<sup>165</sup>

In *Grimes*, Gerald Grimes, the Oklahoma Insurance Commissioner, acted as the liquidator of the United Equity Life Insurance Company (UELIC) to realize an agreement between UELIC and Crown Life Insurance Company.<sup>166</sup> The agreement allowed UELIC to transfer some of its insurance liability to Crown Life Insurance Company, and the case hinged on the agreement’s meaning and legality.<sup>167</sup> After the lower court sided with Crown Life Insurance Company, Gerald appealed to the Tenth Circuit Court of Appeals on the grounds that the court lacked jurisdiction and, if it had jurisdiction, should

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<sup>161</sup> *Id.* at 589.

<sup>162</sup> *Id.* at 590.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 590–91.

<sup>165</sup> *Grimes*, 857 F.2d at 704–05 (internal citations omitted) (abrogated in part by statute on grounds unrelated to *Burford* in 36 Okl. St. § 1928 (2016)).

<sup>166</sup> *Id.* at 700.

<sup>167</sup> *Id.* at 700–01.

have abstained.<sup>168</sup> After dismissing the jurisdiction argument, the Court of Appeals for the Tenth Circuit approached the issue from the perspective of abstention.<sup>169</sup> The court held *Burford* to be the most potentially applicable abstention doctrine.<sup>170</sup>

The court noted the McCarran-Ferguson Act and a traditional deference provided to state receivership proceedings before formulating the set of factors for determining whether to invoke *Burford* abstention.<sup>171</sup> Citing a variety of federal decisions,<sup>172</sup> the court decided to determine the *Burford* issue based on (1) whether the suit derives from a federal cause of action, (2) whether the suit requires the court to determine issues directly relevant to state insurance liquidation proceedings or regulations, (3) whether the state procedures indicate a desire to create special state forums to regulate and adjudicate, and (4) whether difficult or unusual questions of state law are at issue.<sup>173</sup>

After evaluating the facts based on the four factors, the court held that the claim was not grounded in any federal cause of action, the facts strongly related to state regulation of state insolvency proceedings, Oklahoma had designated a forum to oversee the proceedings, and complex state laws and regulations were central to resolving the dispute.<sup>174</sup> Thus, the court invoked *Burford* abstention and remanded the case to the designated state court.<sup>175</sup>

#### D. A Uniform Set of Factors

The factors for determining the application of *Burford* abstention developed by the Tenth Circuit in *Grimes* present an ideal foundation for navigating the post-*NOPSI*, post-*Quackenbush* framework. Tellingly, federal courts in cases involving a party undergoing an insurance insolvency proceeding have cited this approach positively and applied it.<sup>176</sup>

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<sup>168</sup> *Id.* at 701.

<sup>169</sup> *Id.* at 703.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 703–04.

<sup>172</sup> See, e.g., *United Servs. Auto. Asso. v. Muir*, 792 F.2d 356 (3rd Cir. 1986); *Board of Educ. v. Bosworth*, 713 F.2d 1316 (7th Cir. 1983).

<sup>173</sup> *Grimes*, 857 F.2d at 704–05.

<sup>174</sup> *Id.* at 705.

<sup>175</sup> *Id.* at 706–07.

<sup>176</sup> See *Hartford Cas. Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419, 425–26 (7th Cir. 1990); *Barnhardt Marine Ins., Inc. v. New England Int'l Sur., Inc.*, 961 F.2d 529, 254 (5th Cir. 1992) (discussing the court's reasoning in *Grimes*); see also *Overflow Energy, L.L.C. v. Bd. of Cty. Comm'rs of the Cty. of Roger Mills*, No. CIV-13-1136-HE, 2014 U.S. Dist. LEXIS 12860, at \*5–6 (W.D. Okla. Feb. 3, 2014) (“Although, as noted below, there is some basis for concluding *Grimes* may have viewed *Burford* abstention too broadly, it



However, courts continue to dispute the appropriateness of *Burford* abstention in crucial areas not addressed by the Tenth Circuit in *Grimes*.<sup>177</sup> Thus, a need for clarification in evaluating the relevance of the *Burford* abstention doctrine necessitates a broader set of factors that encompasses these additional concerns. This Comment proposes that courts considering *Burford* abstention adopt a set of factors that address both the policy considerations behind *Burford* abstention and the exclusion of insurance companies from the Code while still functioning within the parameters set by bankruptcy law, the McCarran-Ferguson Act, and legal precedent.

The proposed factors (the first four of which draw from the formulation developed by the Court of Appeals for the Tenth Circuit in *Grimes*)<sup>178</sup> are as follows: (1) whether the cause of action is entirely federal; (2) whether the resolution of the suit requires the court to interfere with state policies related to insurance insolvency proceedings; (3) whether state policies or procedures designate a particular state forum for the regulation and adjudication of issues central to the litigation; (4) whether difficult or unusual state laws are at issue; (5) whether the court is sitting in equity; and (6) whether the state that would hear a remanded case has a direct interest in the specific outcome of the litigation in a case brought to a federal court through diversity jurisdiction.

This section will examine these factors in light of the policy considerations behind the McCarran-Ferguson Act and Congress' exclusion of insurance companies from the Code, the text of the Code and the McCarran-Ferguson Act, and the policy considerations that led to the development of the *Burford* abstention doctrine. Finally, the proposed factors will be illustrated by applying them to a hypothetical, and then concerns that they may favor *Burford* abstention excessively will be addressed.

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continues to provide useful guidance as to factors to be weighed.”). *But see* Melahn v. Pennock Insurance, Inc. 965 F.2d 1497, 1507 (8th Cir. 1992) (“The district court’s reliance on the holding in *Grimes* is misplaced because *Grimes* was based mainly on Second Circuit authority which ‘adopted a broad view of abstention’ . . . *NOPSI* does not permit a broad view of abstention.”) (quoting *Smith v. Metropolitan Prop. & Liability Ins. Co.*, 629 F.2d 757, 760 (2nd Cir. 1980)).

<sup>177</sup> Compare *Wolfson*, 51 F.3d at 147 (*Burford* abstention appropriate in a damages action), with *University of Md.*, 923 F.2d at 272 (citing *New Orleans Pub. Serv., Inc.*, 491 U.S. 350) (*NOPSI* limits the application of *Burford* abstention when the court is not sitting in equity).

<sup>178</sup> *Grimes*, 857 F.2d at 704–05.

1. *The Policy Considerations Behind the McCarran-Ferguson Act and the Exclusion of Insurance Companies from the Code*

The McCarran-Ferguson Act clearly expresses the intent of Congress to leave regulations regarding “the business of insurance” to the states.<sup>179</sup> Congress’s motivation in passing the McCarran-Ferguson Act appears to be that Congress did not want to interfere with states that were better-equipped to handle the localized nature of much of the insurance industry because they had appropriate regulatory systems in place already.<sup>180</sup> The Code (somewhat confusingly) conveys the same policy by closing all avenues of filing for bankruptcy off to insurance companies.<sup>181</sup> While some commentators have found the justifications that spurred the passage of the McCarran-Ferguson Act to be outdated,<sup>182</sup> the goal of keeping the business of insurance insolvency with the states remains embodied by standing law.<sup>183</sup> The proposed factors fall in line with these goals. The proposed factors not only address the need to avoid unwarranted federal intrusion on cases involving unusual issues of state law that could be resolved in a designated state forum (the *Wilson* factors essentially do the same), but also specifically designate the presence of state insurance regulation and insolvency proceedings as favoring abstention.<sup>184</sup>

2. *The Text of the Code and the McCarran-Ferguson Act*

Policy arguments aside, the text of the standing law regarding insurance insolvency proceedings favors the relatively broad parameters on *Burford* abstention set by the proposed formulation. The McCarran-Ferguson Act declares that “the continued regulation and taxation by the several States of the business of insurance is in the public interest.”<sup>185</sup> The Code simply excludes

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<sup>179</sup> 15 U.S.C. § 1011 (2012).

<sup>180</sup> See Darr, *supra* note 34, at 607.

<sup>181</sup> See generally 11 U.S.C. § 109 (2012).

<sup>182</sup> See Rice, *supra* note 8, at 404–07 (describing arguments for and against the repeal of the McCarran-Ferguson Act); see also Hon. Samuel L. Bufford, *Suggestion For The National Bankruptcy Review Commission And Congress: Increasing Scope Of Bankruptcy Code*, 4 AM. BANKR. INST. L. REV. 500 (1996) (“I think that the most important systemic defect in the present United States bankruptcy system is that it excludes the insolvencies of insurance companies, banks and other financial institutions. I would recommend that the Bankruptcy Review Commission propose that the Bankruptcy Code be expanded to include these institutions.”).

<sup>183</sup> 15 U.S.C. § 1011 (2012); see also Employee Retirement Income Security Program, 29 U.S.C. § 1144(b)(2) (2012) (excluding pre-emption provisions from applying to laws regulating the business of insurance).

<sup>184</sup> See Grimes, 857 F.2d at 704–05.

<sup>185</sup> See 15 U.S.C. § 1011 (2012); see generally 11 U.S.C. § 109 (2012).

insurance companies from filing for bankruptcy under federal law.<sup>186</sup> The fact that states are the only remaining entities capable of handling the liquidation and insolvency procedures of insurance companies reinforces the significance of preventing unwarranted federal intrusion into these processes. Thus, criticisms levied against courts using formulations that grant relatively broad purview to *Burford* abstention<sup>187</sup> are misguided, as the text of current bankruptcy law favors abstention in appropriate circumstances. If Congress finds federal courts to be invoking *Burford* abstention too often, then Congress can certainly repeal the McCarran-Ferguson Act or amend the Code.

### 3. *The Future of the McCarran-Ferguson Act*

The House of Representatives has made two efforts in recent years to repeal the McCarran-Ferguson Act.<sup>188</sup> The first passed in 2010 by a vote of 406 in favor and 19 against.<sup>189</sup> However, it was never voted on in the Senate. The second passed in 2017 by a vote of 416 in favor and 7 against.<sup>190</sup> The Senate could conceivably vote on a similar repeal during the current legislative session, and President Donald J. Trump has indicated that he would sign such a repeal into law.<sup>191</sup>

The repeal bill passed by the House of Representatives has the stated purpose “[t]o restore the application of the Federal antitrust laws to the business of health insurance to protect competition and consumers.”<sup>192</sup> The bill functions to modify the McCarran-Ferguson act such that “[n]othing contained in this Act shall modify, impair, or supersede the operation of any of the antitrust laws with respect to the business of health insurance . . . .”<sup>193</sup> Notably, the bill applies the repeal to dental insurance but *not* to life insurance, property insurance, or casualty insurance. Thus, if the bill passed into law, only health

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<sup>186</sup> See 15 U.S.C. § 1011 (2012); see generally 11 U.S.C. § 109 (2012).

<sup>187</sup> See *Overflow Energy, L.L.C.*, 2014 U.S. Dist. LEXIS 12860, at \*5–6; cf. *Melahn*, 965 F.2d at 1507.

<sup>188</sup> See Health Insurance Industry Fair Competition Act of 2017, H.R. 617, 115th Cong. (2017); Competitive Health Insurance Reform Act Of 2017, H.R. 372, 115th Cong. (2017).

<sup>189</sup> See H.R. 617, 115th Cong. (“The vote was taken by electronic device, and there were yeas 406, nays 19, not voting 8”).

<sup>190</sup> See Jennifer Webb, *House Passes McCarran-Ferguson Repeal Bill*, INDEP. AGENT MAG. (Mar. 23, 2017), <http://www.iamagazine.com/news/read/2017/03/23/house-passes-mccarran-ferguson-repeal-bill>.

<sup>191</sup> See Donald J. Trump, *Healthcare Reform* (Mar. 3, 2016), <https://assets.donaldjtrump.com/HCREformPaper.pdf> (stating as one of seven goals “Modify existing law that inhibits the sale of health insurance across state lines.”).

<sup>192</sup> H.R. 372, 115th Cong.

<sup>193</sup> *Id.*

insurance and dental insurance would be affected. All other forms of insurance would not be affected.

This repeal, if passed, would have only a negligible effect on the proposed factors test. If the repeal bill goes into law, then the McCarran-Ferguson Act would cease to support one factor (the second) in the proposed formula for applying the *Burford* abstention doctrine only in cases involving the insolvencies of health and dental insurance companies. Note, however, that policy concerns and the exclusion of insurance companies from the Code would still continue to support *Burford* abstention in cases involving all insurance companies undergoing state insolvency proceedings.

#### 4. *The Policy Considerations Behind Burford Abstention: Considering Each Factor in the Proposed Test*

In this section, each factor in the proposed test will be examined and its relevance explained.

##### a. *Whether the Suit is Based on an Entirely Federal Cause of Action*

The Supreme Court in *Burford v. Sun Oil* sought to prevent a court from exercising its jurisdiction in a way that would interfere with complex state administrative procedures.<sup>194</sup> The Court expressed concern over a federal court second-guessing the decisions made by a specialized state administrative body on matters grounded in state policy.<sup>195</sup> The first proposed factor, whether the suit is based on an entirely federal cause of action, effectively addresses these policy concerns.<sup>196</sup> Under this formula, a case grounded in state law favors abstention, whereas a case grounded in federal law disfavors abstention.<sup>197</sup> By weighing the presence of federal issues in the cause of action (for example, federal question subject matter jurisdiction) the first factor satisfies the goal from *Burford v. Sun Oil* of avoiding undue interference with state policies.<sup>198</sup>

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<sup>194</sup> *Burford*, 319 U.S. at 332–34.

<sup>195</sup> *Id.* at 332 (“These questions of regulation of the industry by the state administrative agency, whether involving gas or oil prorationing programs or Rule 37 cases, so clearly involves basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them.”).

<sup>196</sup> *Grimes*, 857 F.2d at 704–05.

<sup>197</sup> *See* *Overflow Energy, L.L.C.*, 2014 U.S. Dist. LEXIS 12860, \*5–6 (holding that the centrality of state law issues to the case favors *Burford* abstention under the *Grimes* formula).

<sup>198</sup> *See* *Burford*, 319 U.S. at 332.

By contrast, the first factor from the *Wilson* formula, whether the cause of action arises under federal or state law, narrows the reach of *Burford* too excessively when taking into account the Court of Appeals for the Fifth Circuit's interpretation of *NOPSI*.<sup>199</sup> The policy goals from *Burford v. Sun Oil* are better fulfilled by examining if the cause of action arises *entirely* under federal law, because the avoidance of federal intrusion on a complex state policy goal through *Burford* abstention could potentially be merited in any case with a cause of action that is not entirely federal. *Burford* abstention may be an "extraordinary and narrow"<sup>200</sup> exception to a federal court's constitutional duty to hear certain cases,<sup>201</sup> but it should remain an option so long as the cause of action is not entirely federal.

*b. Whether the Resolution of the Suit Requires the Court to Interfere with State Policies Related to Insurance Insolvency Proceedings*<sup>202</sup>

The second proposed factor, whether the resolution of the suit requires the court to interfere with state policies related to insurance insolvency proceedings, is central to its success in following the policy goals behind *Burford* abstention.<sup>203</sup> As courts have noted,<sup>204</sup> *Burford* abstention was designed to avoid federal interference with precisely the kind of complex state policy goals that the regulation of insurance companies and their insolvencies represents.<sup>205</sup> A state's regulation of insurance companies and their insolvency proceedings is a long-reaching and important administrative task over an industry that, since 2011, has experienced annual revenue of over \$1.2 trillion.<sup>206</sup>

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<sup>199</sup> *Wilson*, 8 F.3d at 314 (applying *NOPSI*).

<sup>200</sup> *Quackenbush*, 517 U.S. at 728 (quoting *Colorado River Water Conservation Dist.*, 424 U.S. at 813) (quoting *County of Allegheny*, 360 U.S. at 188–89); *see also* *Wolfson*, 51 F.3d at 147 (noting "the strong presumption in favor of exercising federal jurisdiction").

<sup>201</sup> *See Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909) ("When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction.") (citation omitted).

<sup>202</sup> If the bill partially repealing the McCarran-Ferguson Act that has passed in the House is also passed in the Senate and ultimately becomes law, then this factor will be modified to more strongly favor abstention in cases involving insolvent property, life, and casualty insurance companies than cases involving insolvent health and dental insurance companies. *See* H.R. 372, 115th Cong.

<sup>203</sup> *Grimes*, 857 F.2d at 704–05.

<sup>204</sup> *See Callon Petroleum Co.*, 351 F.3d at 209.

<sup>205</sup> *See Clark*, 105 F.3d at 1052 ("permitting the Texas plaintiffs to proceed in federal court would undermine the comprehensive apparatus established by the state of Arizona for the orderly disposition of claims against insolvent insurance companies."). *See generally* *Knoerzer*, *supra* note 86.

<sup>206</sup> *See* Sean Millard, *An investor's guide to the insurance business*, MARKET REALIST (Feb. 11, 2015, 5:07 PM), <http://marketrealist.com/2015/02/us-insurance-industry-largest-world/>.

With its goal of avoiding undue federal influence in complex state administrative schemes, *Burford* abstention is appropriate in cases that might disrupt a state's efforts to regulate insurance companies.<sup>207</sup> Unlike the *Wilson* factors, the proposed formulation specifically references avoiding interference with state insurance insolvency regulations in an accurate reflection of the strong power given to the States in this area.<sup>208</sup>

*c. Whether State Policies or Procedures Designate a Particular State Forum for the Regulation and Adjudication of Issues Central to the Litigation*

The third proposed factor, whether state policies or procedures designate a particular state forum for the regulation and adjudication of issues central to the litigation, reflects a central tenet of the Court's decision in *Burford v. Sun Oil*.<sup>209</sup> The Court sought to give "Texas courts the first opportunity to consider" the regulatory questions before it, demonstrating a preference for the matter to be decided in an appropriate state forum.<sup>210</sup> Furthermore, the Court described how the Texas legislature had "established a system of thorough judicial review by its own state courts" of orders issued by the Texas Railroad Commission.<sup>211</sup> The third proposed factor thus follows the *Burford* doctrine's goals by favoring abstention when a state forum exists to hear the matter, especially when the procedures indicate the state's desire for the matter to be heard in that forum.<sup>212</sup> Although the fifth criteria of the *Wilson* formula, "the presence of a special state forum for judicial review," parallels this goal, it does so on general terms. Those general terms fail to address the *Burford* Court's reliance on the fact that Texas had established a specific system for reviewing the Commission's decisions in its state courts.<sup>213</sup>

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<sup>207</sup> See Knoerzer, *supra* note 86, at 840 ("Because it expressly contemplates an ongoing state proceeding implicating important state regulatory issues, the *Burford* doctrine is particularly well-suited for consideration of whether to abstain in favor of state rehabilitation or liquidation proceedings.")

<sup>208</sup> Compare Grimes, 857 F.2d at 704–05, with *Wilson*, 8 F.3d at 314–16.

<sup>209</sup> *Burford*, 319 U.S. 315.

<sup>210</sup> *Id.* at 332.

<sup>211</sup> *Id.* at 325.

<sup>212</sup> See Grimes, 857 F.2d at 704–05.

<sup>213</sup> *Wilson*, 8 F.3d at 314–17; *Burford*, 319 U.S. at 325.

*d. Whether Difficult or Unusual State Laws Are at Issue*

The fourth proposed factor, whether difficult or unusual state laws are at issue, ties into the initial facts of *Burford v. Sun Oil*.<sup>214</sup> In *Burford*, a crucial element of the Court's reasoning was the presence of an extremely complex set of state laws and issues.<sup>215</sup> The Texas Railroad Commission issued an order based off its analysis of a forty-mile-long oil field in which over 26,000 wells had been drilled.<sup>216</sup> This order was part of a regulatory scheme meant to manage Texas's massive oil industry.<sup>217</sup> Moreover, the Texas Railroad Commission came into existence under a statute passed "for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production."<sup>218</sup> As the Court held, "These questions of regulation of the industry by the state administrative agency, whether involving gas or oil prorationing programs or Rule 37 cases, so clearly involves basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them."<sup>219</sup> The proposed formula adequately incorporates this concern by favoring abstention in cases that involve "difficult or unusual state laws."<sup>220</sup> A clear sign that this factor should be applied to favor *Burford* abstention is the involvement of a state administrative agency well-equipped to carry out a complex task of importance.<sup>221</sup>

*e. Whether the Court is Sitting in Equity*

Ever since the Supreme Court established *Burford* abstention in the context of an equity proceeding,<sup>222</sup> courts have debated whether or not to apply it in a

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<sup>214</sup> *Burford*, 319 U.S. 315.

<sup>215</sup> *Id.* at 318–19.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 319–20.

<sup>218</sup> *Id.* at 320.

<sup>219</sup> *Id.* at 332; *see also* Ohio Valley Env'tl Coalition v. River Cities Disposal, LLC, No. 15-47-DLB-EBA, 2016 U.S. Dist. LEXIS 40791, at \*24 n.12 (E.D. Ky Mar. 29, 2016) (invoking *Burford* abstention where "[n]ot only would federal review at this juncture be disruptive of Kentucky's efforts to establish a coherent policy with respect to solid waste facilities and air quality standards, but the resolution of OVEC's claims are likely to involve difficult questions of state law.").

<sup>220</sup> *Grimes*, 857 F.2d at 704–05.

<sup>221</sup> *See generally* *Burford*, 319 U.S. 315. *See also* *Sierra Club v. Chesapeake Operating, LLC*, No. CIV-134-F, 2017 U.S. Dist. LEXIS 90913, at \*31 (W.D. Okla. April 4, 2017) (invoking *Burford* abstention where "it is plain that the Oklahoma Corporation Commission has brought to bear a level of technical expertise that this court could not hope to match.").

<sup>222</sup> *Burford*, 319 U.S. at 334 ("sound respect for the independence of state action requires the federal equity court to stay its hand.").

damages action.<sup>223</sup> Most notably, the Supreme Court in *Quackenbush* held that a court can only stay a case on *Burford* grounds in a damages action, but the court can also dismiss or remand if it is sitting in equity.<sup>224</sup> Elsewhere, courts have generally held that the fact that a court is sitting in equity favors *Burford* abstention,<sup>225</sup> but courts have reached different conclusions regarding the extent to which the presence of a damages action forecloses *Burford* abstention as a possibility.<sup>226</sup>

A bright-line rule on the significance of whether a court is sitting in equity defies the relevant case law and legal precedent, as illustrated by the detailed analysis of the complexities of the administrative tasks of the Texas Railroad Commission in *Burford v. Sun Oil*.<sup>227</sup> Instead, the proposed factor of whether the court is sitting in equity, with an equity action favoring abstention and a different type of action disfavoring abstention, clearly follows the policy goals behind the *Burford* doctrine. As the Eighth Circuit Court of Appeals in *Wolfson v. Mutual Benefit Life Ins. Co.* noted:

We think it unwise to make rigid distinctions between legal and equitable claims in the merged federal system, particularly for claims such as those under ERISA whose historical antecedents are unclear . . . . No doubt abstention is less apt to be appropriate when the federal plaintiff seeks money damages, but we do not read the Supreme Court's abstention jurisprudence as completely foreclosing abstention in money damage cases.<sup>228</sup>

Both the *Wilson* and *Grimes* formulations fail to include an examination of whether a court is sitting in equity in determining the applicability of *Burford* abstention.<sup>229</sup> The centrality of the equitable nature of the relief sought in

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<sup>223</sup> See *supra* Section I, Subsection D.

<sup>224</sup> *Quackenbush*, 517 U.S. at 721; see also *Feige v. Sechrest*, 90 F.3d 846, 850–51 (3rd Cir. 1996) (a court may stay, but not dismiss or remand, a damages action on *Burford* grounds).

<sup>225</sup> See, e.g., *University of Md.*, 923 F.2d at 272 (rejecting an argument that *Burford* abstention is equally applicable at law or in equity).

<sup>226</sup> Compare *Wolfson*, 51 F.3d at 147 (“No doubt abstention is less apt to be appropriate when the federal plaintiff seeks money damages, but we do not read the Supreme Court’s abstention jurisprudence as completely foreclosing abstention in money damage cases.”), with *Fragoso*, 991 F. 2d at 882 (*Burford* abstention inappropriate in a torts action), and *Garamendi v. Allstate Ins. Co.*, 47 F.3d 350, 356 (9th Cir. 1995) (“a district court may not abstain under *Burford* when the plaintiff seeks only legal relief”).

<sup>227</sup> *Burford*, 319 U.S. at 339–41; see *Wolfson*, 51 F.3d at 145 (“Abstention is inherently a fact-specific inquiry.”).

<sup>228</sup> *Wolfson*, 51 F.3d at 147 (citations omitted).

<sup>229</sup> See *Wilson*, 8 F.3d at 313–15; *Grimes*, 857 F.2d at 704–05.



*Burford v. Sun Oil* illustrates the significance of this omission.<sup>230</sup> In the Supreme Court's re-examination of the doctrine in *Quackenbush*, the ruling emphasized the applicability of *Burford* abstention to suits of equitable and non-equitable natures while clarifying that "while we have held that federal courts may stay actions for damages based on abstention principles, we have not held that those principles support the outright dismissal or remand of damages actions."<sup>231</sup> This distinction, and the preference it embodies for the application of *Burford* abstention in equitable actions (while limiting, but not eliminating, its application in damages actions) necessitates the consideration of the nature of the case in an ideal *Burford* formulation. More broadly, the unique, discretionary powers of a court of equity support the relevance of concerns for public policy embodied by the *Burford* abstention doctrine's goal of avoiding interference with a complex state administrative scheme.<sup>232</sup> By contrast, judicial discretion to renounce jurisdiction has less support in the context of actions at law.<sup>233</sup>

*f. Whether the State that Would Hear a Remanded Case Has a Direct Interest in the Specific Outcome of the Litigation in an Action Brought to a Federal Court through Diversity Jurisdiction*

The sixth proposed factor, whether the state that would hear a remanded case has a direct interest in the specific outcome of the litigation in an action brought to a federal court through diversity jurisdiction, addresses an easily-overlooked consequence of a remand resulting from a court invoking *Burford* abstention in the context of diversity jurisdiction. Diversity jurisdiction originated from Article III of the Constitution's grant of federal judicial power to cases "between Citizens of different States."<sup>234</sup> Among the most-cited justifications for the existence of diversity jurisdiction is a fear of bias against out-of-state litigants from state court judges and juries.<sup>235</sup> These concerns underlie one facet of why the doctrine of abstention constitutes only "an extraordinary and narrow exception to the duty of a District Court to adjudicate

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<sup>230</sup> *Burford*, 319 U.S. at 334 ("a sound respect for the independence of state action requires the federal equity court to stay its hand").

<sup>231</sup> *Quackenbush*, 517 U.S. at 721.

<sup>232</sup> See generally Garamendi, 47 F.3d at 354-56.

<sup>233</sup> See *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 120-21 (1981) ("There is little room for the 'principle of comity' in actions at law where, apart from matters of administration, judicial discretion is at a minimum.") (Brennan, J., dissenting).

<sup>234</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>235</sup> James M. Underwood, *The Late, Great Diversity Jurisdiction*, 57 CASE W. RES. L. REV. 179, 182 (2006).

a controversy properly before it.”<sup>236</sup> And these concerns manifest themselves in a remanded action where the state that will hear the case has a strong interest in its outcome, as a state judge or jury may be biased (or at least may create the appearance of bias) as a result.<sup>237</sup>

For example, in *Baltimore Bank for Cooperatives v. Farmer’s Cheese Cooperative*, the Court of Appeals for the Third Circuit noted the intervention as a party defendant of the Commonwealth of Pennsylvania in a case brought through diversity jurisdiction that, if remanded on *Burford* grounds, it would be heard in Pennsylvania.<sup>238</sup> The court held that this weakened the argument for abstention.<sup>239</sup> The presence of the state as a defendant in a case with an out-of-state plaintiff raised the same set of concerns that were behind the inception of diversity jurisdiction, thus leading the Court of Appeals for the Third Circuit to reject *Burford* abstention in favor of hearing the case in a federal forum.<sup>240</sup> The proposed formula adopts a factor that addresses these considerations such that the presence of a state that (A) has an interest in the specific outcome of the litigation that may create bias or the appearance of bias and (B) would also hear a remanded case disfavors *Burford* abstention.

A state’s interest in the specific outcome of litigation as described by this factor should be differentiated from a state’s broad interest in achieving policy goals through a complex state administrative scheme. Central to *Burford* abstention is an overriding goal of avoiding the disruption of a state’s administrative efforts to achieve a goal of public importance, and the presence of such a potential disruption certainly favors invoking *Burford* abstention. By contrast, a state’s clear and immediate interest in the outcome of a specific case favorable to a particular party does not elicit the same policy concerns.

## 5. Applying the Factors—A Hypothetical

### a. The Facts

A hypothetical lawsuit involving one party arguing in favor of *Burford* abstention can help to illustrate the proper application, as well as the utility, of the factors proposed here. In this scenario, Live-Long Life Insurance Company is undergoing an insolvency proceeding in its state of incorporation, Maine.

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<sup>236</sup> County of Allegheny, 360 U.S. at 188.

<sup>237</sup> See *Baltimore Bank for Coops.*, 583 F.2d 104.

<sup>238</sup> *Id.* at 111–13.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

Live-Long is also the fourth-largest employer in Maine, employing thousands of citizens whose job prospects are jeopardized by the insolvency. An ad company, Stanley Hooper, files a lawsuit against Live-Long a year after Live-Long's insolvency proceedings began. The lawsuit seeks \$1,000,000 for contract damages or, in the alternative (if the court finds no contract exists), unjust enrichment.<sup>241</sup> Stanley Hooper is based in Delaware and files the lawsuit in federal court, claiming diversity jurisdiction on the grounds that the parties are incorporated in different states and the amount sought exceeds \$75,000.<sup>242</sup> After Stanley Hooper files the lawsuit, Live-Long argues that the court should abstain from hearing the case on *Burford* grounds.

*b. Applying The Proposed Factors*

The federal court would then examine the facts of the case in light of the six factors presented here: (1) whether the cause of action is entirely federal, (2) whether the resolution of the suit requires the court to interfere with state policies related to insurance insolvency proceedings, (3) whether state policies or procedures designate a particular state forum for the regulation and adjudication of issues central to the litigation, (4) whether difficult or unusual state laws are at issue, (5) whether the court is sitting in equity, and (6) whether the state that would hear a remanded case has a direct interest in the specific outcome of the litigation brought to a federal court through diversity jurisdiction.

*c. Whether the Cause of Action is Entirely Federal*

The first factor, whether the cause of action is entirely federal, supports abstention on these facts. Had the issue been brought to the federal court under federal question jurisdiction or partially on the basis of the application of a federal law, the case for *Burford* abstention would be weakened. Here, however, Stanley Hooper's damages claim derives from contract law, which is

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<sup>241</sup> See *June Roberts Agency v. Venture Props.*, 676 A.2d 46, 49 n.1 (Me. 1996) (explaining that while the existence of a contract precludes recovery on a theory of unjust enrichment, a party "is not precluded from pleading both theories because a factfinder may find that no contract exists and may still award damages on the theory of unjust enrichment."). See generally *Evergreen W. Bus. Ctr., LLC v. Emmert*, 323 P.3d 250 (2014) (discussing, under an Oregon state statute, the validity of alternative legal claims for damages and equitable relief).

<sup>242</sup> See 28 U.S.C. § 1332 (2012).

governed by states. Further, Stanley Hooper's alternative claim for unjust enrichment is not entirely grounded in federal law.<sup>243</sup>

*d. Whether the Resolution of the Suit Requires the Court to Interfere with State Policies Related to Insurance Insolvency Proceedings*

The second factor, whether the resolution of the suit requires the court to interfere with state policies related to insurance insolvency proceedings, weighs in favor of abstention. The amount of the claim, \$1,000,000, is high enough that a verdict for the plaintiff could potentially disrupt Maine's efforts to manage Live-Long's insolvency. Policyholders seeking payment, and creditors of Live-Long, may have the distribution of funds to them from Live-Long's estate interrupted and lessened as a result. The state equivalent of an automatic stay, which would serve to protect the estate of Live-Long Insurance Company,<sup>244</sup> would be impeded by a ruling in federal court against it.

Crucially, a court could plausibly determine that Stanley Hooper is attempting to "leapfrog ahead" of other creditors, given that Stanley Hooper filed the lawsuit after the insurance insolvency proceedings began.<sup>245</sup> Courts have expressed concerns that allowing such cases to proceed can create a "race to the courthouse" that encourages claimants and creditors to sue insolvent insurance companies in federal courts.<sup>246</sup> By contrast, had Stanley Hooper filed before the insolvency proceedings began or seemed imminent, no attempt to "leapfrog ahead" of other claimants would be necessary.

*e. Whether State Policies or Procedures Designate a Particular State Forum for the Regulation and Adjudication of Issues Central to the Litigation*

The third factor, whether state policies or procedures designate a particular state forum for the regulation and adjudication of issues central to the litigation, depends on the state policies and procedures. In *Lentz v. Trinchard*, the Louisiana Eastern District Court applied a similar factor from *Wilson* to

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<sup>243</sup> See, e.g., *June Roberts Agency*, 676 A.2d at 49 n.1 (evaluating an unjust enrichment claim in a state court).

<sup>244</sup> See Me. Rev. Stat. Ann. tit. 24-A, ch. 57, § 4449 (2017) (describing a stay of all proceedings against a delinquent insurer).

<sup>245</sup> See *Lentz*, 730 F. Supp. 2d at 589–90; *Clark v. Underwriters Mgmt. Corp.*, 2003 U.S. Dist. LEXIS 8378, at \*21–22 (N.D. Ill. 2003).

<sup>246</sup> See *Lentz*, 730 F. Supp. 2d at 589–90; *Underwriters Mgmt. Corp.*, 2003 U.S. Dist. LEXIS 8378, at \*21–22.

hold that the presence of a local circuit court as a rehabilitation court fulfilled this factor, favoring abstention.<sup>247</sup> Here, Maine's Insurance Code gives original jurisdiction over delinquency proceedings to the Maine Superior Court and designates that venue shall be appropriate in a state court in the county of the insurer's principal place of business.<sup>248</sup> Thus, under Maine law, the applicable state court for delinquency proceedings would likely also serve as a venue for addressing the case within the context of the relevant codes for insurance insolvency proceedings. The presence of a state forum for adjudication of the issue thus functions to support abstention.

*f. Whether Difficult or Unusual State Laws Are at Issue*

The fourth factor, whether difficult or unusual state laws are at issue, disfavors abstention. No difficult or unusual state law appears to exist, unless the relevant contract provisions are atypically perplexing.<sup>249</sup> Additionally, Maine has also established three clear factors to use when evaluating the alternative claim of unjust enrichment.<sup>250</sup>

*g. Whether the Court Is Sitting in Equity*

The fifth factor, whether the court is sitting in equity, neither favors nor disfavors abstention. On the one hand, Stanley Hooper's first claim is for damages, a legal remedy. However, Stanley Hooper's alternative claim is for unjust enrichment, an equitable remedy. Therefore, this factor neither supports nor weakens the case for *Burford* abstention on its face.<sup>251</sup>

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<sup>247</sup> Lentz, 730 F. Supp. 2d at 590.

<sup>248</sup> Me. Rev. Stat. Ann. tit. 24-A, ch. 57, § 4354 (2017) (note that venue for an insurance company with its principal place of business in another state is selected differently).

<sup>249</sup> Reducing the potential complexity of the contract law is the fact that Maine has adopted all but one article of the Uniform Commercial Code. Me. Rev. Stat. Ann. tit. 11, §§ 1-101-10-108 (2017).

<sup>250</sup> See *ERA-Northern Assocs. v. Border Tr. Co.*, 662 A.2d 243, 245 (Me. 1995) (describing three factors for determining whether an activity conferred an unjust enrichment on a party: (1) it conferred a benefit on the party, (2) the party had appreciation or knowledge of the benefit, and (3) the party's acceptance or retention of the benefit was under such circumstances as to make it inequitable for the party to retain the benefit without payment of its value).

<sup>251</sup> The comparative plausibility of the two alternative claims could be relevant here. If a contract clearly existed, then this factor would disfavor abstention. If a contract almost certainly did not exist, then the equitable remedy of unjust enrichment would play a central role in the case, favoring abstention.

*h. Whether the State that Would Hear a Remanded Case Has a Direct Interest in the Specific Outcome of the Litigation in an Action Brought to a Federal Court through Diversity Jurisdiction*

The sixth factor, whether the state that would hear a remanded case initially brought to federal court through diversity jurisdiction has a direct interest in the case's outcome, disfavors abstention due to the specific facts of the hypothetical. The goal of avoiding potential bias in a state court proceeding against an out-of-state party, that serves as a foundation for diversity jurisdiction, applies here. Stanley Hooper could justifiably fear bias from a state judge or state jury in a lawsuit in a Maine state court. An out-of-state plaintiff suing one of Maine's leading employers will be precariously positioned while undergoing an insolvency proceeding. Since Maine has an interest in an outcome favoring Live-Long Insurance, this last factor weakens the case for abstention.

*i. Conclusion of the Hypothetical Analysis*

A court would consider these six factors in light of the "extraordinary and narrow exception" language used in *Quackenbush* to characterize *Burford* abstention.<sup>252</sup> Here, the fourth factor disfavors abstention due to the lack of any difficult or unusual state laws in the case, and the sixth factor disfavors abstention due to the state interest in the specific outcome. The first, second, and third factors support abstention due the lack of grounding of the causes of action in federal law, the resolution of the case potentially interfering with state policies related to insurance insolvency proceedings, and the presence of a state forum for adjudicating the dispute.

Overall, *Burford* abstention would be justified in this case. Since the presence of complex state policies related to oil well drilling was central the Supreme Court's reasoning in *Burford v. Sun Oil*,<sup>253</sup> the lack of complex state laws in this hypothetical case would normally cause a court to refuse to invoke *Burford* abstention. However, the large scale of the disruption to a state's efforts to regulate the business of insurance, that would be brought about by a potential \$1,000,000 verdict against a party undergoing an insurance

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<sup>252</sup> *Quackenbush*, 517 U.S. at 728 (quoting *Colorado River Water Conservation Dist.*, 424 U.S. at 813) (quoting *County of Allegheny*, 360 U.S. at 188–89).

<sup>253</sup> *Burford*, 319 U.S. 315.

insolvency proceeding, serves here to override that concern and favor *Burford* abstention.<sup>254</sup>

### 6. *Avoiding Overreach*

While this hypothetical exhibits a relatively liberal approach to *Burford* abstention, that results from drawing from the Tenth Circuit's *Grimes* factors, this approach is tempered by the additional considerations of diversity jurisdiction and equitable remedies. In determining the applicability of *Burford* abstention in *Overflow Energy, L.L.C. v. Board of County Commissioners of the County of Roger Mills*, the District Court for the Western District of Oklahoma referred to both the *Grimes* factors and "the more narrow formulation of *Quackenbush* and *NOPSI*" to reach the same result of abstaining.<sup>255</sup> The court noted that "there is some basis for concluding *Grimes* may have viewed *Burford* abstention too broadly . . . ."<sup>256</sup> The Court of Appeals for the Eighth Circuit also noted in *Melahn v. Pennock Insurance, Inc.* that a lower court's reliance on *Grimes* was "misplaced because *Grimes* was based mainly on Second Circuit authority which 'adopted a broad view of abstention.'"<sup>257</sup>

The formula presented here, while embracing a less stringent view of the effects of *NOPSI* and *Quackenbush* on *Burford* abstention than that held by the courts in *Overflow Energy* or *Melahn*, addresses these concerns through its additions to the *Grimes* factors. The considerations embodied by the final two factors assuage fears of unfettered application of *Burford* abstention in violation of the federal court's duty to hear cases brought properly before it.<sup>258</sup> By examining whether a court is sitting in equity, the proposed formula discourages the invocation of *Burford* abstention in actions seeking compensatory, punitive, statutory, and reliance damages in a manner that the *Grimes* formula by itself would not address. Similarly, by examining whether the state would hear a remanded case brought to federal court through diversity jurisdiction has a direct interest in the specific outcome of the litigation, the

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<sup>254</sup> Additionally, a court could examine the comparative likelihoods of success of the alternative contract damages claim and unjust enrichment claim. Given the equitable nature of unjust enrichment claims, the case for *Burford* abstention would be greater if this claim was significantly more plausible than the damages claim.

<sup>255</sup> *Overflow Energy, L.L.C.*, 2014 U.S. Dist. LEXIS 12860, at \*9–10.

<sup>256</sup> *Id.* at \*5.

<sup>257</sup> *Melahn*, 965 F.2d at 1507 (citing *Smith*, 629 F.2d at 760).

<sup>258</sup> See *Quackenbush*, 517 U.S. at 728 (The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.") (quoting *Colorado River Water Conservation Dist.*, 424 U.S. at 813) (quoting *County of Allegheny*, 360 U.S. at 188–89).

proposed formula discourages *Burford* abstention in a manner that upholds the original justifications behind diversity jurisdiction.<sup>259</sup> By guiding the process of evaluating the appropriateness *Burford* abstention, the proposed formula aptly follows the constitutional and policy considerations behind the doctrine's development.

### CONCLUSION

The proposed formula will help navigate the competing concerns behind the “troublesome and enigmatic” *Burford* abstention doctrine.<sup>260</sup> Applied properly, the doctrine serves an essential purpose of preventing harmful intrusion by federal courts into state matters that can undermine important regulatory goals. State insolvency procedures can be rendered ineffective if parties know that they can concoct a way to sue an insurance company undergoing an insolvency proceeding in federal court. Such actions would disrupt the state's ability to establish coherent policy in this area. Courts should recognize that *NOPSI* and *Quackenbush* served primarily to clarify the scope of *Burford* while only narrowing its parameters slightly, if at all.<sup>261</sup>

As a result, the proposed formula remains the ideal way to apply this difficult doctrine in order to ensure that the policy goals set out by the Supreme Court in *Burford v. Sun Oil*, the McCarran-Ferguson Act, and the Code are satisfied.<sup>262</sup> Despite the role of state insurance guarantee organizations, *Burford* abstention in the appropriate circumstances protects the insured from the risk of a federal lawsuit disrupting an insolvency procedure and preventing coverage payments. Despite the duty held by each federal court to hear cases brought to it under mandatory jurisdiction, sometimes the proper course of action is for a court to “stay its hand.”<sup>263</sup>

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<sup>259</sup> See Underwood, *supra* note 235, at 182 (noting the often-cited justification behind diversity jurisdiction of avoiding bias against an out-of-state party).

<sup>260</sup> Young, *supra* note 52, at 863.

<sup>261</sup> New Orleans Pub. Serv., Inc., 491 U.S. 350; Quackenbush, 517 U.S. 706.

<sup>262</sup> *Burford*, 319 U.S. 315; 15 U.S.C. § 1011 (2012); 11 U.S.C. §§ 101–1532 (2012).

<sup>263</sup> *Burford*, 319 U.S. at 334.

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