UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0020

September Term, 2014

UNITED INSURANCE COMPANY OF AMERICA ET AL.

v.

MARYLAND INSURANCE ADMINISTRATION ET AL.

Krauser, C.J.,
Kehoe,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: October 14, 2015

The dispute before us arises out of a difference in opinion regarding the proper interpretation of Md. Code Ann. (1995, 2011 Repl., 2014 Supp.) § 16-118 of the Insurance Article (the "Act" or "statute") as it applies to life insurance contracts that were in effect prior to the statute's effective date, which was October 1, 2013. Appellants, United Insurance Company of America and The Reliable Life Insurance Company, are two life insurance companies that conduct business in the State of Maryland. Appellees are the Maryland Insurance Administration and the Insurance Commissioner, in her official capacity. Appellants filed a civil action against appellees in the Circuit Court for Anne Arundel County, seeking a declaration that the Act is inapplicable to policies issued prior to its effective date.

Appellees filed a motion to dismiss. They contended that the Insurance Article provided an administrative remedy to the companies and that they must first pursue that remedy prior to seeking relief in the circuit court. The circuit court agreed and dismissed the action. Appellants present one issue on appeal, namely, whether the doctrine of exhaustion of administrative remedies applies in this case. We will affirm the judgment of the circuit court.

Background

The circuit court dismissed the complaint and the petition. In reviewing the court's decision, "we must assume the truth of the well-pleaded factual allegations of the complaint, including the reasonable inferences that may be drawn from those allegations." *Adamson v.*

Corr. Med. Servs., Inc., 359 Md. 238, 246 (2000) (citations omitted). Appellants' substantive allegations are set out in their complaint. The relevant portions of the complaint, in summary, tell us the following:

Appellants are reputable and financially sound businesses that have been offering insurance policies in Maryland for decades. Currently they have a combined total of over 135,000 policies in effect in Maryland. They offer insurance products designed for families with low to moderate incomes. It is standard in these contracts for payment of a policy to be made upon "receipt of due proof of death." Appellants have consistently placed the obligation on the beneficiaries to notify the insurer of an insured's death. Their premium schedules reflect the costs savings realized by placing the obligation on the beneficiary to provide due proof of death.

In 2012, the Maryland General Assembly enacted a new provision of the Insurance Article: § 16-118. The Act requires the following of insurance companies:

> perform a comparison of the insurer's in-force life insurance policies, annuity contracts, and retained asset accounts against the latest version of a death master file to identify any death benefit payments that may be due under the policies, contracts, or retained asset accounts as a result of the death of an insured, annuitant, or retained asset account holder.

Ins. § 16-118(c)(1).

The statute further requires that the insurer conduct these comparisons at "regular intervals," but at least on a semiannual basis. *Id*. at (c)(2). If the comparison reveals a match

in the Social Security Administration's Death Master File[1] with an insured, the insurer must: 1) make a good faith effort to confirm the death of the insured; 2) determine whether benefits are due; and 3) if benefits are due, make a good faith effort to locate the beneficiary and provide the beneficiary with the appropriate claim forms and instructions necessary to make the claim. *Id*. at (d). The Act does not specifically address whether appellants are required

[1]The Death Master File "is an extract of death information [contained in the] records of Social Security Numbers (SSN) assigned to individuals since 1936, and includes, if available, the deceased individual's SSN, first name, middle name, surname, date of birth, and date of death." http://www.ssa.gov/dataexchange/request_dmf.html (last visited September 23, 2015).

The Act addresses a widely perceived problem that has been recognized in several jurisdictions; one example comes from our sister jurisdiction of West Virginia:

> It is estimated that there is over one billion dollars in death benefits held by insurance companies that are unclaimed by the beneficiaries of deceased policy holders. The insurance companies hold onto the policy proceeds without attempting to use technology to determine if the insured has died and track down beneficiaries.
>
> Insurance companies regularly search the DMF to determine if an annuitant has died allowing it to terminate annuity payments. Conversely, most have not used the DMF to determine if a life insured has died resulting in the payment of life insurance benefits. Life insurance companies have used the DMF when it is to their benefit and ignored the DMF when it may cause them to pay money.

State ex rel. Perdue v. Nationwide Life Ins. Co., ___ W. Va. ___, No. 14-0100, 2015 WL 3823175 (W. Va. June 16, 2015), (footnote omitted) Ketchum, J. concurring (citing Devin Hartley, *A Billion Dollar Problem: The insurance industry's widespread failure to escheat unclaimed death benefits to the states*, 19 CONN. INS. L.J. 363 (2012-2013).

to perform these acts with regard to policies that were in-force on the statute's effective date.

Appellants aver that if the Act is applied to in-force policies, the requirements will unconstitutionally interfere with their contracts with Maryland residents. They allege that the Act's requirement that it compare their lists of policy holders against the death master file impairs their existing contracts that require "due proof of death" prior to payment of a policy. Additionally, they claim that they are authorized under their currently existing policies to retain and invest the policy proceeds until the insured reaches the mortality limiting age. They assert that the Act impairs these terms if it is applied to in-force policies as of the statute's effective date.

On February 28, 2013, representatives for the appellants attended a meeting with the Insurance Commissioner. At that meeting, the Commissioner informed the representatives that she interpreted the statute to apply to all in-force policies, including those in effect prior to the statute's effective date. The Commissioner further stated that the she would enforce the requirements of the Act against all of appellants' in-force policies.

Dissatisfied with this result, appellants filed the present action. In their operative complaint, they set out three theories of relief. First, they asserted that the Commissioner's proposed application of the act to policies in effect as of the its effective date constituted a

retroactive application of the statute in violation of Articles 19[2] and 24[3] of the Maryland Declaration of Rights and Article III § 40[4] of the Maryland Constitution. Second, they averred that application of the Act to existing policies abrogated their substantive contract rights in violation of the same constitutional provisions. Finally, they claimed that application of the Act to existing policies constituted an unconstitutional impairment of their contractual rights in violation of Article I § 10[5] of the Constitution of the United States.

[2]Article 19 states:

> That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.

[3]Article 24 states:

> That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land *(amended by Chapter 681, Acts of 1977, ratified Nov. 7, 1978)*.

[4]Article III, § 40 states:

> The General Assembly shall enact no Law authorizing private property to be taken for public use without just compensation, as agreed upon between the parties, or awarded by a jury, being first paid or tendered to the party entitled to such compensation.

[5]Article I, § 10 states:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing

(continued...)

Appellants sought a judgment declaring that (1) the Act does not apply retroactively to in-force policies as of the statute's effective date; or, alternatively, (2) that retroactive application of the Act would be void as violative of one or more of the previously-mentioned constitutional provisions.

Appellees filed a motion to dismiss, claiming that appellants must exhaust their available administrative remedies prior to seeking relief in the judicial system. The trial court agreed with appellees and granted the motion to dismiss and this appeal followed.

[5](...continued)
but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Analysis

I. Standard of Review

The proper standard of review for the grant of a motion to dismiss is whether the trial court was legally correct. *Higgenbotham v. Pub. Serv. Comm'n of Maryland*, 171 Md. App. 254, 264 (2006). "Ordinarily, in reviewing the dismissal of a complaint on a motion to dismiss, 'we look only to the allegations in the complaint and any exhibits incorporated in it and assume the truth of all well-pled facts in the complaint as well as the reasonable inferences that may be drawn from those relevant and material facts.'" *Smith v. Danielczyk*, 400 Md. 98, 103–04 (2007). We review the circuit court's grant of a motion to dismiss *de novo*. *Id.*

II. Exhaustion of Administrative Remedies

The doctrine of administrative exhaustion is an aspect of "the relationship between legislatively created administrative remedies and alternative statutory, common law or equitable judicial remedies." *Prince George's County v. Ray's Used Cars*, 398 Md. 632, 644 (2007). The administrative remedy in question is set out in Md. Code Ann. (1995, 2011 Repl.) § 2-210(a)(2)(ii) of the Insurance Article ("Ins."), which, among other things, requires the Commissioner to hold a hearing "on written demand by a person aggrieved by any act

of, threatened act of, or failure to act by the Commissioner[.]"[6] The statutory remedy is the declaratory judgment action filed by appellants.

Generally, there are three categories of administrative remedies in relation to a judicial remedy: "exclusive," "primary," and "concurrent." *Falls Road Community Ass'n, Inc. v. Baltimore County*, 437 Md. 115, 135 (2014) (citing *Zappone v. Liberty Life Ins. Co.*, 349 Md. 45, 60-61 (1998)).

An "exclusive" administrative remedy is one that the Legislature intends to be the sole avenue of relief—"there simply is no alternative cause of action . . . ." *Id*. (internal quotation marks and citation omitted). A "primary" administrative remedy is one where "a claimant must invoke and exhaust the administrative remedy, and seek judicial review of an adverse administrative decision, before a court can properly adjudicate the merits of the alternative judicial remedy." *Id*. (internal quotation marks and citation omitted). Finally, a "concurrent" administrative remedy is one where "the plaintiff at his or her option may pursue the judicial remedy without the necessity of invoking and exhausting the administrative remedy." *Id*. at 135–36 (internal quotation marks and citation omitted). Where a "primary" administrative remedy is available to a complaining party, that remedy must be exhausted before a party can seek relief in the courts. *Id*. at 136 (citing *Renaissance Centro Columbia, LLC v. Broida*, 421 Md. 474, 483–85 (2011)).

[6]Section 2-210(a)(2)(ii) states that it applies "except as otherwise provided in [the Insurance Article.]" The parties do not contend that there is a relevant statutory exception.

The parties disagree as to what sort of administrative remedy is available. Appellants aver that the administrative remedy is intended to be concurrent; appellees contends that the statute provides a primary remedy.

A. Exclusive, Primary or Concurrent?

Statutes typically do not explicitly state whether an administrative remedy is intended to be exclusive, primary, or concurrent. *Ray's Used Cars,* 398 Md. at 645. In resolving the issue, courts begin with a "strong presumption" that the administrative remedy is intended to be primary. *Ray's Used Cars*, 398 Md. at 645; *Zappone*, 349 Md. at 63. However, there are "at least four germane factors" that can rebut this presumption. *Carter v. Huntington Title & Escrow, LLC.*, 420 Md. 605, 616–17 (2011). These factors include: the comprehensiveness of the administrative remedy, the agency's view of its own jurisdiction, the claim's dependence upon the statutory scheme which also contains the administrative remedy, and the claim's dependence upon the agency's expertise. *Id.* at 617 (citing *Zappone*, 349 Md. at 64–66).

Appellants claim that, when the facts of this case are examined under these factors, the presumption that the administrative remedy is primary is rebutted. We disagree.

The first factor examined in *Zappone* was the scope of the administrative remedy. 349 Md. at 64. The Court stated: "A very comprehensive administrative remedial scheme is some

indication that the Legislature intended the administrative remedy to be primary, whereas a non-comprehensive administrative scheme suggests the contrary." *Id.*

Appellants claim that the remedy provided for pursuant to Ins. § 2-210[7] is not comprehensive. They support this contention with two arguments. First, they allege that "neither the Circuit Court nor the Administration suggest that [Ins.] § 2-201 would have granted the Commissioner primary jurisdiction . . . if she had not made that statement."[8] They conclude that had the Commissioner not made the statement, they would have been authorized to seek a declaratory judgment in circuit court. Secondly, they contend that the "key event" that mandated exhaustion—the Commissioner's statement—is not a "threatened act," and thus not covered by the remedial scheme of Ins. § 2-210.

Their first contention is unpersuasive. First, we note that the argument is irrelevant to the outcome of this case, because it poses a hypothetical and counterfactual scenario. The circuit court based its decision on the facts raised in appellants' complaint—including that

[7]Ins. § 2-210 states in pertinent part:

(2) The Commissioner shall hold a hearing: . . . .

> (ii) except as otherwise provided in this article, on written demand by a person aggrieved by any act of, threatened act of, or failure to act by the Commissioner or by any report, regulation, or order of the Commissioner, except an order to hold a hearing or an order resulting from a hearing.

[8]The "statement" refers to the Commissioner's statement during the informal February 28 meeting where she stated that she interpreted the Act to apply to in-force policies.

the Commissioner stated she would enforce the Act against appellants' current policies. Ruling on an issue based on how the case *might* have been resolved absent this critical fact is fruitless. Second—entertaining the hypothetical—we are unconvinced that a circuit court would enter a declaratory judgment declaring a party's rights under a statute prior to the Administration's providing any indication of how it will apply the statute.

We are also unpersuaded that the Commissioner's statement was not a "threatened act." The Insurance Article does not define "threatened act." Thus, we must ascertain the intent of the Legislature when it included the term "threatened act" in Ins. § 2-210. *See Walzer v. Osborne*, 395 Md. 563, 571 (2006) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature.") (internal citations omitted).

"When the statutory language is clear, we need not look beyond the statutory language to determine the Legislature's intent." *Marriott Employees Fed. Credit Union v. MVA*, 346 Md. 437, 445 (1997). "If the words of the statute, construed according to their common and everyday meaning, are clear and unambiguous and express a plain meaning, we will give effect to the statute as it is written." *Jones v. State*, 336 Md. 255, 261 (1994). Furthermore, "we neither add nor delete words to a clear and unambiguous statute to give it a meaning not reflected by the words the Legislature used or engage in forced or subtle interpretation in an attempt to extend or limit the statute's meaning." *Walzer*, 395 Md. at 572.

Section 2-210 of the Insurance Article states that the Commissioner shall hold a hearing on written demand by a person aggrieved by any "act of, threatened act of, or failure to act by the Commissioner . . . ." Ins. § 2-210(a)(2). We believe it is significant that the Legislature provided the Commissioner authority to review both "acts" and "threatened acts" of the agency. As appellants note, the Commissioner "never started any formal administrative process here." If the Commissioner had done so, there would be no question that the Commissioner had acted. Nonetheless, appellants allege that the Commissioner stated that she "would enforce the requirements for the Act against all of [appellants'] in-force policies, including those issued prior to the Act's effective date." While clearly falling short of an "act" by the Commissioner, we agree with the circuit court that this statement—specifically directed towards appellants and their in-force claims—constituted a "threatened act." Thus, we conclude that Ins. § 2-210 provides a comprehensive remedial scheme.

The second *Zappone* factor is the agency's view of its own jurisdiction. Appellees, unsurprisingly, take the position that it has primary jurisdiction over appellants' claims. Acknowledging appellees' position, appellants suggest that their contentions on this point "are insufficient to overcome the other three factors" involved in a *Zappone* analysis because they are challenging the constitutionality of the Act.

The third factor—characterized in *Zappone* as "extremely significant"—is the nature of the alternative judicial action pursued by the plaintiff. 349 Md. at 65. "Where the judicial cause of action is wholly or partially dependent upon the statutory scheme which also contains the administrative remedy, or upon the expertise of the administrative agency, the Court has usually held that the administrative remedy was intended to be primary and must first be invoked and exhausted before resort to the courts." *Id.*

Appellants assert that their claims do not "depend" on the statutory scheme because they allege violations to their constitutional rights, which they claim is a purely legal question that does not depend on the Insurance Code. We disagree.

Several decisions by the Court of Appeals have examined contentions similar to appellants'. In *Zappone*, the Court concluded that the petitioner's claim was independent of the statutory scheme because the plaintiff had set forth "recognized common law causes of action sounding in deceit and negligence." 349 Md. at 67. It concluded that this cause of action was "wholly independent" of the statute, and that "no interpretations or applications" of the statute were involved in resolving the case and that the Commissioner's expertise would be "irrelevant to these common law causes of action. *Id.*

Similarly, in *Mardirossian v. Paul Revere Life Ins. Co.*, 376 Md. 640, 648 (2003), the Court examined whether the administrative remedy was primary when a remedy was also available under the doctrine of specific performance of the common law of contracts. The

Court stated that the doctrine of specific performance under contract law offered a fully cognizable available remedy that was wholly independent of the remedy available under the statute in question. *Id.* at 648–49. It concluded that this common law contract remedy was "fully concurrent [with the administrative remedy], and may be pursued in court without exhausting the administrative remedy. . . ." *Id.* at 649.

Taken together, *Zappone* and *Mardirossian* establish that statutes, which may provide an available administrative remedy to a claimant, do not "subsume or swallow [an] entirely independent cause of action." *Carter*, 420 Md. at 626. However, appellants' claims do not involve an "entirely independent cause of action" separate from the application of the Act. Indeed, their claims arise out of the Administration's interpretation of the Act. While the basis of appellants' claims may lie in constitutional law, the entirety of their claims pertain to how the Commissioner proposes to interpret and enforce the statutory scheme and how the Commissioner's interpretation affects their constitutional rights. Thus, the case before us is distinguishable from *Zappone* and *Mardirossian*.

The final *Zappone* factor is whether "the expertise of the administrative agency is . . . relevant to the judicial cause of action[.]" *Zappone* 349 Md. at 65. Appellants argue that the expertise of the agency is irrelevant to their claims because:

> to decide this case, a court need only interpret a single provision in Appellants' contracts—the "due proof of death provision"—and apply settled constitutional principles to decide whether the Act impairs the contractually vested right established by that provision. Resolving these questions of

> contractual and statutory interpretation, and of constitutional law, are preeminently judicial functions.

(Brackets, citations and some quotation marks omitted).

We believe appellants oversimplify the issue somewhat. Maryland's test for whether a statute is retroactive is more nuanced than they suggest. To be sure, Maryland adheres to the principle that retroactive statutes are not favored and statutes are presumed to operate prospectively unless there is a clear legislative indication to the contrary. *Allstate Ins. v. Kim*, 376 Md. 276, 289 (2003). However, as the Court noted in *John Deere Const. & Forestry v. Reliable Tractor*, 406 Md. 139, 147 (2008), "[t]o date, although we have clearly established the analysis to be used ***when*** applying a statute retroactively, this Court has only provided limited analysis of ***what*** constitutes a retrospective application of a statute." (Emphasis added.) The Court explicitly adopted the test for retroactivity articulated by the Supreme Court in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). The Court of Appeals explained that a statute applies retroactively when it "'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" *Id.* at 147 (quoting *Landgraf* , 541 U.S at 280). The Court noted that "'a statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment[.]'" *Id.* (quoting *Landgraf*, 511 U.S. at 269). Instead, a judicial determination that a law operates retroactively, "require[s] a 'process of judgment concerning the nature and extent of the

change in the law and the degree of connection between the operation of the new rule and a relevant past event.' In the process, the factors to be considered are 'fair notice, reasonable reliance, and settled expectations.'" *Id*. (quoting *Landgraf,* 511 U.S. at 270). With the *Landgraf* analysis in mind, we turn to the asserted factual basis for appellants' claims.

In their amended complaint, and in support of their contention that the Act "impairs the contractually vested right established" by the proof of death provision, appellants asserts that retroactive enforcement of the statute "alters the parties' existing contractual allocation of rights and responsibilities and will result in substantially increased administrative costs (formatting altered)"; that "the costs of undertaking these new burdens [of complying with the Act] in connection with policies entered into prior to the effective date of the Act are substantial, especially in relation to the total amount of annual premiums collected in Maryland and the relatively modest face values of the policies at issue"; and that the cost of compliance with the Act "fundamentally alters the economic assumptions underlying [appellants'] policies and the premium pricing." Without in any way commenting upon the merits of appellants' substantive contentions, we are persuaded that determining whether these assertions are factually accurate and assessing "the nature and extent of the change in the law" in light of the existing regulatory framework are matters that lie fairly within the agency's expertise.

In summary, three of the four *Zappone* factors—the scope of the administrative remedy, the nature of the alternative judicial action, and the relevancy of the agency expertise—all weigh in favor of the conclusion that Ins. § 2-210 provides appellants with a primary administrative remedy. The other *Zappone* factor, the agency's view of its own jurisdiction, is neutral to appellants' position at best. As such, we conclude, as did the circuit court, that the administrative remedy contained in Ins. § 2-210 is primary.

The insurance companies also argue that, even if the administrative remedy is primary, the doctrine of administrative exhaustion should not apply in this case. We turn to this contention.

III. An Exception to the Requirement of Administrative Exhaustion?

In *Prince George's County v. Blumberg*, 288 Md. 275, 284–85 (1980), the Court of Appeals set out the five well-established exceptions to the doctrine of administrative exhaustion:

> 1. When the legislative body has indicated an intention that exhaustion of administrative remedies was not a precondition to the institution of normal judicial action. [*White v. Prince George's County.*, 282 Md. 641, 649 (1978)].
>
> 2. When there is a direct attack, constitutional or otherwise, upon the power or authority (including whether it was validly enacted) of the legislative body to pass the legislation from which relief is sought, as contrasted with a constitutional or other type issue that goes to the application of a general statute to a particular situation. [*Harbor Island Marina v. Calvert County*, 286 Md. 303, 308 (1979)].

3. When an agency requires a party to follow, in a manner and to a degree that is significant, an unauthorized procedure. [*Stark v. Board of Registration*, 179 Md. 276, 284–85 (1941)].

4. Where the administrative agency cannot provide to any substantial degree a remedy. [*Poe v. Baltimore City*, 241 Md. 303, 308–09 (1966)].

5. When the object of, as well as the issues presented by, a judicial proceeding only tangentially or incidentally concern matters which the administrative agency was legislatively created to solve, and do not, in any meaningful way, call for or involve applications of its expertise. [*Maryland-Nat'l Capital Park & Planning v. Washington Nat'l Arena*, 282 Md. 588, 594–604 (1978).].

Appellants argue that their claims fall within the constitutional challenge exception. They acknowledge that the constitutional exception to the requirement for administrative exhaustion is generally available only to those who mount a facial attack on the validity of a statute. *See, e.g., Ray's Used Cars*, 398 Md. at 655 ("[T]o come within the [constitutional] exception, 'the attack must be made to the constitutionality as a whole,' including all of its parts and *all of its applications*.") (quoting *Goldstein v. Time-Out Family Amusement*, 301 Md. 583, 590 (1984)) (emphasis added); *Ehrlich v. Perez*, 394 Md. 691, 700 (2006) ("This 'constitutional exception' permits an aggrieved litigant to proceed immediately to court to seek a declaratory judgment or equitable remedy, regardless of the existence of an available administrative appeal, where the ***sole*** contention raised in the court action is based on a facial attack on the constitutionality of the governmental action." (citation omitted; emphasis added).

Appellants do not question the General Assembly's authority to enact the statute, nor do they argue that the statute itself was invalidly enacted. Rather, appellants brought the action "solely to challenge the *retroactive* application of [the Act]." (emphasis added). Appellants, however, argue that the constitutional exception should nonetheless apply to their claims because:

> Appellants present challenges to "legislative power," so they should qualify for the exception. To illustrate, if Appellants prevail on their constitutional claims, they will do so on the grounds that the General Assembly lacks constitutional authority to enact laws that retroactively impair their contracts. If Appellants prevail on their alternative challenge based on the presumption against retroactivity, they will do so because a court has concluded that the General Assembly's constitutional authority to adopt the Act was sufficiently dubious that the Act must be interpreted as prospective only.

We see the substance of appellants' claims in different terms. First, they attack the application of the Act to policies in force on the basis that such an application would be an unconstitutional application of a statute. Second, they contend that, as a matter of statutory construction, the Act should be interpreted to not apply to policies in force as of the statute's effective date. The first contention is clearly a constitutional challenge. The second contention clearly is not, notwithstanding appellants' insertion of the words "constitutional authority" into their articulation of the challenge. Because appellants assert a non-constitutional theory of relief, invocation of the constitutional exception is inappropriate. *See Ray's Used Cars,* 398 Md. at 656 ("[T]he pursuit and exhaustion of the appropriate

administrative proceedings might well result in the plaintiffs obtaining relief without the necessity of reaching the constitutional issues at the administrative level or upon judicial review . . . . The constitutional issues might 'never arise if the prescribed administrative remedies were followed[.]'" (quoting *Gingell v. Bd. of Cnty. Comm'rs for Prince George's Cnty.*, 249 Md. 374, 377 (1968)).

Additionally, as previously discussed, appellants' contentions raised factual issues lying with the agency's particular competence:

> [W]here a constitutional challenge to a statute, regardless of its nature, is intertwined with the need to consider evidence and render findings of fact, and where the legislature has created an administrative proceeding for such purpose, this Court has regularly taken the position that the matter should be initially resolved in the administrative proceeding.

Id. at 655–56 (quoting *Insurance Comm'r v. Equitable Life Assur. Soc. of U.S.*, 339 Md. 596, 623 (1995)).[9]

In conclusion, the circuit court did not err when it concluded that appellants have failed to exhaust their administrative remedies.

[9]To support their contention that this case falls into the constitutional challenge exception, appellants assert that any administrative proceeding would be futile. But there is nothing in the complaint that indicates what arguments were presented to the Commissioner by appellants nor is it clear whether the Commissioner's statement, which we gather was not reduced to writing, was intended to represent the final, irrevocable position of the Administration.

THE JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY IS AFFIRMED. APPELLANTS TO PAY COSTS.