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ASSISTANT EXECUTIVE SECRETARY &  
LEGAL COUNSEL  
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COURT IMPROVEMENT PROGRAM  
SANDRA L. KARISON, DIRECTOR  
EDUCATIONAL SERVICES  
CAROLINE E. KIRKPATRICK, DIRECTOR  
FISCAL SERVICES  
JOHN B. RICKMAN, DIRECTOR  
HUMAN RESOURCES  
RENÉE FLEMING MILLS, DIRECTOR

## SUPREME COURT OF VIRGINIA



OFFICE OF THE EXECUTIVE SECRETARY  
100 NORTH NINTH STREET  
RICHMOND, VIRGINIA 23219-2334  
(804) 786-6455

JUDICIAL INFORMATION TECHNOLOGY  
MICHAEL J. RIGGS, SR., DIRECTOR  
JUDICIAL PLANNING  
CYRIL W. MILLER, JR., DIRECTOR  
JUDICIAL SERVICES  
PAUL F. DELOSH, DIRECTOR  
LEGAL RESEARCH  
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LEGISLATIVE & PUBLIC RELATIONS  
KRISTI S. WRIGHT, DIRECTOR  
MAGISTRATE SERVICES  
JONATHAN E. GREEN

May 15, 2020

Angela A. Ciolfi  
Legal Aid Justice Center  
626 East Broad Street  
Richmond, Virginia 23219

Re: Letter of May 14, 2020, to Chief Justice Lemons, *et al.*

Dear Ms. Ciolfi,

Thank you for your letter of May 15, 2020. Your letter makes the following specific requests (my responsive comments follow in brackets in italicized type):

- 1) All courts shall develop and publicly announce procedures for ensuring that no eviction lawsuit will be accepted for filing, and that no judgment or further proceeding will be taken on any unlawful detainer or eviction action filed on or after March 27, during the federally protected period; *[All courts have been alerted to the requirements of the CARES Act]*
- 2) No court shall enter any judgment or order for possession or writ of restitution in an eviction case without first making a finding, supported by *admissible* evidence, that the eviction is not prohibited by the CARES Act; *[Again, all courts have been alerted to the requirements of the CARES Act]*
- 3) No court shall hear or decide any eviction matter without first developing and publicly announcing procedures for ensuring that: a. All defendants have been provided adequate advance notice of any restrictions on courthouse access, alternatives for appearing or defending by phone or videoconference, and how to utilize such alternatives; b. High-risk litigants have been made aware that they may request and obtain continuances or reasonable accommodations, and may do so without difficulty; and c. Defendants are informed of available free legal services in their communities; *[The emergency orders the Court has entered emphasize the preference for remote audio-visual hearings. See, e.g. paragraph 3 of this Court's May 6, 2020 Order ("Fourth Order"). Paragraph 10 of the Fourth Order states "Continuances and excuses for failure to appear shall be*

Letter to Angela A. Ciolfi  
May 15, 2020  
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*liberally granted for any cause resulting from the impact of the ongoing COVID-19 crisis.”]*

4) Continuances shall be liberally granted for the purpose of seeking representation or for investigating whether the eviction pertains to a covered dwelling, as that term is defined in 15 U.S.C. § 9058(a)(1). *[Again paragraph 10 of the Fourth Order states “Continuances and excuses for failure to appear shall be liberally granted for any cause resulting from the impact of the ongoing COVID-19 crisis.”]*

Your May 14 letter also requests “all public records maintained by the Supreme Court of Virginia or the Office of the Executive Secretary relating to policies and procedures designed to ensure that eviction proceedings not go forward in violation of the CARES Act.” Public records responsive to your request are available on our web site at <http://www.vacourts.gov> and include the Orders that have been entered by the Court. I expect the attached memo from Executive Secretary Karl Hade will also be posted on the web site. With best regards, I am

Sincerely yours,



Edward M. Macon

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May 15, 2020

To: Active and Retired Circuit Court Judges  
Active and Retired General District Court Judges

From: Karl R. Hade, Executive Secretary

Re: Unlawful Detainers and Writs of Eviction

As your courts prepare for the gradual transition from emergency to more regular court operations it is important for all judges to be aware of recent federal and state laws impacting the hearing of unlawful detainer cases. Please understand that the purpose in sending this memorandum is simply to ensure that all judges are aware of these laws. My office does not express any opinion concerning their application or interpretation.

### **1. The Coronavirus Aid, Relief, and Economic Security Act (CARES Act)**

As you consider any unlawful detainer cases, it is important to be aware of the relevant provisions of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), PL 116-136, March 27, 2020, 134 Stat 281, pertaining to evictions. Relevant provisions from the Act are attached to this memorandum. Section 4024(b) of the CARES Act prohibits landlords of certain rental “covered dwellings” from initiating eviction proceedings or “charg[ing] fees, penalties, or other charges” against a tenant for the nonpayment of rent. These protections extend for 120 days from enactment (March 27, 2020). Section 4024(c) requires landlords of covered properties to provide tenants at least 30 days notice before they must vacate the property. It also prohibits those landlords from issuing a notice to vacate during the 120 day period.

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A covered dwelling is defined as rental housing occupied by a residential tenant, with or without a lease, located on a covered property. A covered property is one that participates in certain federal housing programs or has a federally backed mortgage loan or multifamily mortgage loan. A federally backed mortgage loan includes any loan that is secured by a lien on residential property, including a refinance, that is federally backed. Under the CARES Act, landlords that are not receiving rental payments are prohibited from initiating legal action to evict residential tenants from a covered dwelling until the temporary moratorium period ends on July 25, 2020.

Attached is an informational document prepared by Congressional Research Services that may provide you with some further information and background. I encourage you to do your own research and familiarize your self with the terms of the moratorium. Again, I emphasize that this memorandum is not intended to provide analysis or legal advice.

## **2. House Bill 1420 (Chapter 1231) and House Bill 340 (Chapter 1202)**

These legislative changes are very recent. As a result, you will need to interpret and apply the legislative language itself to implementation of this legislation. These bills passed during the reconvened Session on April 22, 2020 with emergency enactment clauses, and each became effective April 22, 2020.

House Bill 1420 (Chapter 1231) amends Code §§ 55.1-1204 and 55.1-1250 to cap the amount a landlord may charge for late fees. The bill provides that a landlord shall not charge a tenant for late payment of rent unless such charge is provided for in the written rental agreement. No such late charge shall exceed the lesser of 10 percent of the periodic rent or 10 percent of the remaining balance due and owed by the tenant.

<https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+HB1420ER2+pdf>

House Bill 340 (Chapter 1202), which adds Code § 44-209, was initially introduced to address the impact of federal government shutdowns on tenants, landlords, and homeowners. The bill provides a 60-day stay of an unlawful detainer for nonpayment of rent for tenants and a 30-day stay of foreclosure proceedings for homeowners of, and owners who rent to a tenant, a one-family to

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four-family residential dwelling unit who request a stay and provide written proof that they are (i) an employee of the United States government, (ii) an independent contractor for the United States government, or (iii) an employee of a company under contract with the United States government who was furloughed or was or is otherwise not receiving wages or payments as a result of a closure of the United States government. The Governor amended this bill by adding a second enactment clause extending the bill's protections to the COVID-19 state of emergency. This extension expires 90 days after the Governor's declared state of emergency ends.

For purposes of the bill's applicability to COVID-19, the second enactment clause defines the written proof required to invoke the law's protections as:

(i) a paystub showing zero dollars in earnings for a pay period within the period for which the Governor has declared a state of emergency (the Emergency) in response to the novel coronavirus (COVID-19) pandemic public health crisis, (ii) a copy of a furlough notification letter or essential employee status letter indicating the employee's status as nonessential due to the Emergency, or (iii) any other documentation deemed appropriate by a court or lender.

Section 3 of the second enactment clause provides that any continuance or stay period provided by the second enactment clause shall be tolled during the period of any judicial emergency declared pursuant to Code § 17.1-330. Section 4 provides that the 60-day continuance shall run concurrently with any period of eviction protection provided for by any other state or federal law.

<https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+HB340ER2+pdf>

**CARES Act provisions**  
15 USCA § 9058

SEC. 4024. TEMPORARY MORATORIUM ON EVICTION FILINGS.

(a) DEFINITIONS.—In this section:

(1) COVERED DWELLING.—The term “covered dwelling” means a dwelling that—

(A) is occupied by a tenant—

(i) pursuant to a residential lease; or

(ii) without a lease or with a lease terminable under State law; and

(B) is on or in a covered property.

(2) COVERED PROPERTY.—The term “covered property” means any property that—

(A) participates in—

(i) a covered housing program (as defined in section 41411(a) of the Violence Against Women Act of 1994 (34 U.S.C. 12491(a))); or

(ii) the rural housing voucher program under section 542 of the Housing Act of 1949 (42 U.S.C. 1490r); or

(B) has a—

(i) Federally backed mortgage loan; or

(ii) Federally backed multifamily mortgage loan.

(3) DWELLING.—The term “dwelling”—

(A) has the meaning given the term in section 802 of the Fair Housing Act (42 U.S.C. 3602); and

(B) includes houses and dwellings described in section 803(b) of such Act (42 U.S.C. 3603(b)).

(4) FEDERALLY BACKED MORTGAGE LOAN.—The term “Federally backed mortgage loan” includes any loan (other than temporary financing such as a construction loan) that—

(A) is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from 1 to 4 families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and

(B) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by any officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary of Housing and Urban Development or a housing or related program administered by any other such officer or agency, or is purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.

(5) FEDERALLY BACKED MULTIFAMILY MORTGAGE LOAN.—The term “Federally backed multifamily mortgage loan” includes any loan (other than temporary financing such as a construction loan) that—

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(A) is secured by a first or subordinate lien on residential multifamily real property designed principally for the occupancy of 5 or more families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and

(B) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by any officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary of Housing and Urban Development or a housing or related program administered by any other such officer or agency, or is purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.

(b) MORATORIUM.—During the 120-day period beginning on the date of enactment of this Act, the lessor of a covered dwelling may not—

(1) make, or cause to be made, any filing with the court of jurisdiction to initiate a legal action to recover possession of the covered dwelling from the tenant for nonpayment of rent or other fees or charges; or

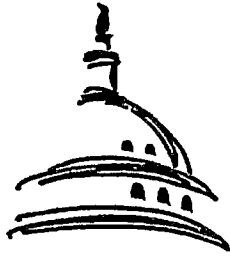
(2) charge fees, penalties, or other charges to the tenant related to such nonpayment of rent.

(c) NOTICE.—The lessor of a covered dwelling unit—

(1) may not require the tenant to vacate the covered dwelling unit before the date that is 30 days after the date on which the lessor provides the tenant with a notice to vacate; and

(2) may not issue a notice to vacate under paragraph (1) until after the expiration of the period described in subsection (b).

CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT, PL 116-136,  
March 27, 2020, 134 Stat 281.



## CARES Act Eviction Moratorium

April 7, 2020

The COVID-19 pandemic has disrupted business operations nationwide, leading to dramatic job losses that threaten the ability of many to meet their financial obligations, including housing rental payments. To aid individuals and businesses harmed by the pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act (P.L. 116-136).

Section 4024 of the CARES Act provides a temporary moratorium on eviction filings as well as other protections for tenants in certain rental properties with federal assistance or federally related financing. These protections are designed to alleviate the economic and public health consequences of tenant displacement during the COVID-19 outbreak. They supplement temporary eviction moratoria and rent freezes implemented in states and cities by governors and local officials using emergency powers. While Section 4024's tenant protections are narrower in scope than those proposed by some lawmakers, called for by some tenant-advocates, or enacted in some other countries, they represent arguably unprecedented action by the federal government in an area of law that, largely, states and localities traditionally govern. Thus, questions remain about the law's effects on tenants, landlords, and rental markets.

### Eviction and Rental Payment Protections

CARES Act Section 4024(b) prohibits landlords of certain rental "covered dwellings" from initiating eviction proceedings or "charg[ing] fees, penalties, or other charges" against a tenant *for the nonpayment of rent*. These protections extend for 120 days from enactment (March 27, 2020).

Section 4024(c) requires landlords of the same properties to provide tenants at least 30 days-notice before they must vacate the property. It also bars those landlords from issuing a notice to vacate during the 120-day period. In contrast to the eviction and late fee protections of Section 4024(b), which are expressly limited to nonpayment, Section 4024(c) does not expressly tie the notice to vacate requirement to a particular cause. Thus, Section 4024(c) arguably prohibits landlords from being able to force a tenant to vacate a covered dwelling for nonpayment or *any other reason* until August 23, 2020 (i.e., 120 days after enactment, plus 30 days after notice is provided).

Section 4024(b)'s and (c)'s protections, however, do not absolve tenants of their legal responsibilities to pay rent. Tenants who do not pay rent during the eviction grace period may still face financial and legal liabilities, including eviction, after the moratorium ends.

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## What properties does the CARES Act protect?

The CARES Act's eviction protections only apply to "covered dwellings," which are rental units in properties: (1) that participate in federal assistance programs, (2) are subject to a "federally backed mortgage loan," or (3) are subject to a "federally backed multifamily mortgage loan."

Covered federal assistance programs include most rental assistance and housing grant programs, including public housing, Housing Choice Vouchers, Section 8 Project-Based Rental Assistance, rural housing programs, and the Low Income Housing Tax Credit (LIHTC) program.

A "federally backed mortgage loan" is a single-family (1-4 units) residential mortgage owned or securitized by Fannie Mae or Freddie Mac or insured, guaranteed, or otherwise assisted by the federal government. The term includes mortgages insured by the Federal Housing Administration and the Department of Veterans Affairs, and the Department of Agriculture's direct and guaranteed loans. The act defines a "federally backed *multifamily* mortgage loan" almost identically to "federally backed mortgage loan" except that it applies to properties designed for five or more families.

## Outstanding Questions

The unique nature of the CARES Act Section 4024 tenant protections raises several questions.

First, how many of the nation's roughly 43 million renters live in "covered dwellings"? Researchers estimate that roughly 12.3 million rental units have federally backed financing, representing 28% of renters. Other data show more than 2 million housing vouchers along with approximately 5 million federally assisted rental units. However, these data do not include every covered program and likely include duplicate properties because federal assistance can be provided to units with federally backed loans. Renters not covered by the federal moratorium could be covered by a state or local moratorium.

Second, how will people know they are covered? While some renters living in federally assisted units may know they are assisted, *unassisted* renters are unlikely to know the mortgage status of their unit. Property owners may know if their mortgages are federally insured because they must have applied for the insurance. However, owners might not know whether Fannie Mae or Freddie Mac subsequently purchased their loans from their lenders because owners are not parties to these transactions. The opacity of this information raises questions about enforcement of the protections.

Third, if tenants do not make rent payments during the moratorium, what are the financial ramifications for landlords, tenants, and housing markets? Relief programs established under the CARES Act and other government-provided assistance could mitigate the financial impact of missed rent payments. Landlords, for example, may be eligible for mortgage forbearance or small business loans and grants provided under different provisions of the CARES Act. Tenants may also be eligible for the act's direct payments to individuals and enhanced unemployment compensation. These programs might ease the financial burdens of some landlords and tenants, but are unlikely to offset all financial burdens stemming from the pandemic.

The CARES Act does not address how landlords can respond to missed payments after the moratorium ends. While the act bars landlords from *charging* late fees and other penalties because of a tenant's nonpayment during the 120 days, whether or not late fees and interest on rental payments are prohibited from *accruing* during the grace period and being charged after it ends is unclear.

After the 120-day period, landlords presumably could move to evict tenants who did not meet their rental obligations, subject to the CARES Act's 30-day notice requirement and consistent with state and local laws. Whether an eviction wave will come at the end of the moratorium is unclear. Landlord eviction decisions will likely be affected by local rental market conditions at the time, including the extent to

which other renters have suffered financial hardship during the pandemic, and whether landlords can successfully negotiate repayment plans with tenants.

## Author Information

Maggie McCarty  
Specialist in Housing Policy

David H. Carpenter  
Legislative Attorney

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