

EVICTION ORDERS AND THE CARES ACT

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In response to the Covid-19 pandemic, Congress enacted the federal Coronavirus Aid, Relief and Economic Security Act, commonly known as the CARES Act (the “Act”). The Act is lengthy and complex, and it deals with a wide range of responses to help the public deal with the pandemic. One portion of it deals with eviction proceedings. This article will discuss how it affects deputy sheriffs who serve and enforce eviction orders.

The Supreme Court of Virginia also issued a temporary *state* moratorium on courts ordering evictions. It expired on June 29. State courts now have authority again to order evictions. This article deals only with what effect – if any – the Act, a federal law, has on eviction orders from state courts.

The Act imposes a temporary moratorium – currently until July 25 - on evictions from “Covered Properties,” meaning only those properties in certain specific federal housing programs. It does not impose an eviction moratorium on any other properties – only “covered” properties.

What are “covered properties”? The Act defines the term as follows:

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. *CARES Act*, Section 4024(A).

For these properties, no eviction order may be entered while the federal moratorium remains in effect.

For tenants facing possible eviction, their attorneys or advocates may assert that a Sheriff's office may not serve an eviction order without first determining whether the property is a “covered property” and thus subject to the federal moratorium. There may even be a demand that the deputy arrange for an additional judicial hearing to determine if the federal moratorium applies to the property in question.

What should a sheriff or deputy do when faced with such a request or demand?

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The answer is simple: the sheriff or deputy should do what he or she always does when given a facially valid court order: the order should be served or enforced according to its terms.

What are the legal bases of this advice? There are three:

- The Act does not require a separate judicial hearing on whether the property in question is a “covered property” to which the moratorium applies. Some properties are “covered,” while many are not. It is up to the court – not a sheriff or deputy - to make this determination in the eviction proceeding, if the issue is raised there. Once an eviction order has been issued, a sheriff or deputy must assume the court has found that all legal requirements for the eviction – including those requirements in the Act, if any – have been met.
- A sheriff or deputy is neither authorized by law nor qualified by training to conduct a hearing to make factual findings and reach legal conclusions about whether the property in question is “covered.”
- Service and implementation of a court order is a ministerial function, not a discretionary function. There are several cases discussing this important distinction:

A *discretionary function* is one for which the government official must use discretion and judgment in deciding whether or not to perform the function, or how to perform it. (See 1985-86 Va. AG 133, 134 [issuance of a warrant by a magistrate of judge]; *Freeman v. City of Norfolk*, 221 Va. 57 (1980) [construction of streets]). Its counterpart is a *ministerial function*, which has been defined as a governmental act that is mandatory for a government official. *Town of Jonesville v. Powell Valley Village*, 254 Va. 70, 78 (1997). For example:

- The duties of a clerk related to filing and lodging of court papers are ministerial. *Harve v. Cheapeake & Potomac Tel. Co.*, 198 Va. 213, 218 (1956).
- Once a court orders approval of a payment voucher for court-appointed counsel, a clerk does not have authority to look behind the order and withhold payment pending a determination that the attorney has submitted the proper invoices. *Harve*.
- A sheriff has a ministerial duty to enforce the terms of a court conviction order. *Burrell v. Commonwealth*, 283 Va. 474, 478 (2012).

To the precise point: *enforcement of a court order – such as an eviction order – is a ministerial function, not a discretionary function.* As the Supreme Court of Virginia held, earlier this year, “This Court has consistently held that [a] final order is one which disposes of the whole subject, gives all the relief contemplated, provides with reasonable completeness for giving effect to the sentence, and leaves nothing to be done in the cause save to superintend ministerially the execution of the order.” *Jefferson v. Commonwealth*, ___ Va. ___ #180993 (April 9, 2020).

In summary, the CARES Act moratorium on evictions applies only to those properties falling within the statutory definition of the term “covered property.” The question of whether a property is “covered” is highly technical. It depends on whether the property is in certain specific federal housing programs. Only a court has authority to determine whether a particular property is “covered” and exempt, not a sheriff or deputy. Once an eviction order has been entered, a sheriff or deputy has a ministerial duty to enforce it. If an attorney or advocate feels the Act’s moratorium applies, he or she should go to a court to seek a stay on enforcement, not attempt to place that responsibility on a sheriff or deputy.