PRACTICE ADVISORY:

LITIGATING CIMT THEFT REMOVAL CHARGES AND ADJUDICATIVE RETROACTIVITY IN THE SECOND CIRCUIT AFTER *OBEYA V. SESSIONS*[1]

On March 8, 2018, the Second Circuit issued a favorable opinion in *Obeya v. Sessions*, 884 F.3d 442 (2d Cir. 2018), finding under the categorical approach that pre-November 16, 2016 convictions under New York's petit larceny statute, NYPL § 155.25, are not for crimes involving moral turpitude ("CIMTs"), and narrowing the circumstances where the Board of Immigration Appeals ("BIA") may apply new agency rules retroactively. The *Obeya* opinion also strongly supports arguments in the Second Circuit that other New York larceny and stolen property convictions that precede the BIA's rule change are not CIMTs; affirms the application of a strict categorical approach in immigration adjudications, and notably conducts no realistic probability analysis in identifying the least-acts-criminalized under § 155.25; and provides support for arguments challenging the correctness of the BIA's new rule for what constitutes a generic CIMT theft offense.

I. SUMMARY OF *OBEYA V. SESSIONS*

Mr. Obeya is a longtime lawful permanent resident. In 2008, he pleaded guilty to New York Penal Law § 155.25, petit larceny, an A-misdemeanor, for which he served probation and a short jail sentence. The Department of Homeland Security ("DHS") subsequently took him into custody and charged him as deportable for conviction for a CIMT committed within five years of admission, pursuant to INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2(A)(i). The Immigration Judge sustained the charge and ordered Mr. Obeya removed. The BIA affirmed the removal order. On petition for review in 2014, the Second Circuit issued *Obeya v. Holder*, 572 F. App'x 34, 35 (2d Cir. 2014) (unpublished), remanding Mr. Obeya's case to the BIA with instructions "to determine in the first instance whether Obeya's conviction under [N.Y. Penal Law § 155.25] rendered him removable."

On remand, the BIA again found Obeya removable in a published opinion, *Matter of Obeya*, 26 I. & N. Dec. 856 (BIA 2016). The same day the BIA decided *Matter of Obeya*, it issued another published opinion in *Matter of Diaz-Lizarraga*, 26 I. & N. Dec. 847 (BIA 2016), where the BIA issued a new rule as to what theft offenses trigger CIMT removability. The BIA

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[1] The author of this Practice Advisory is Andrew Wachtenheim, Supervising Attorney, Immigrant Defense Project. Many thanks to Manny Vargas for his invaluable comments and edits, to Richard Mark, Partner, Gibson Dunn, for his tireless representation of Mr. Obeya in this matter, and to Dan Kesselbrenner. Practice Advisories identify select substantive and procedural immigration law issues. They are based on legal research and contain potential arguments and opinions of the authors. They do not replace independent legal advice provided by an attorney or representative familiar with a client's case.

applied that new rule to Obeya to find him removable. Mr. Obeya appealed again to the Second Circuit. The Second Circuit found that the BIA could not retroactively apply the new rule to Mr. Obeya or immigrants situated similarly, and that under the BIA's prior rule for theft CIMT removability, conviction under NYPL § 155.25 is not categorically a CIMT because the least-acts-criminalized do not require an intent to permanently deprive. *See Obeya*, 884 F.3d at 449-450.

II. *OBEYA*'S EXPRESS HOLDINGS

A. The BIA may not retroactively apply the new generic definition of a CIMT theft offense announced in *Matter of Diaz-Lizarraga*.

The *Obeya* court held that the BIA could not retroactively apply its new rule for what constitutes a theft CIMT to find Mr. Obeya removable. *Obeya*, 884 F.3d at 444-445. The Court acknowledged that there are circumstances where retroactive application of new rules established through agency adjudication is permissible, but that the need for retroactive application ""must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles."" *Id.* at 445 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

The *Obeya* court then applied a five-factor test already adopted by the Second Circuit and a majority of Courts of Appeals[2] to determine the permissibility of retroactive application of a new rule fashioned through adjudicative rulemaking. *Id.* Those factors are:

1. Whether the case is one of first impression;

2. Whether the new rule presents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law;

3. The extent to which the party against whom the new rule is applied relied on the former rule;

4. The degree of the burden which a retroactive order places on a party; and

5. The statutory interest in applying a new rule despite the reliance of a party on the old standard.

Obeya, 884 F.3d at 445 (citing *Lugo v. Holder*, 783 F.3d 119, 121 (2d Cir. 2015)). The way in which the court applied those factors in Mr. Obeya's case has broad application to others convicted of petit larceny in New York, and to others against whom the BIA seeks to retroactively apply new conviction-based removability rules. This is how the *Obeya* court assessed each factor:

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[2] *See De Niz Robles v. Lynch*, 303 F.3d 1165 (10th Cir. 2015); *Velasquez-Garcia v. Holder*, 760 F.3d 571 (7th Cir. 2014); *Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007); *McDonald v. Watt*, 653 F.2d 1035 (5th Cir. 1981); *Retail, Wholesale and Department Store Union, AFL–CIO v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972).

Factor 1: whether the case is one of first impression. The court found this factor was "not seriously at issue" and favored Mr. Obeya. *Obeya*, 884 F.3d at 445 (internal citation omitted). The court recognized that since "the Board's earliest days" the Board had a rule that a CIMT theft offense required an intent to permanently deprive. *Id.* (internal citation omitted).

Factor 2: Whether the new rule presents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law. The government argued in Mr. Obeya's case that in *Diaz-Lizarraga*, "the BIA was merely "revising its standard to reflect the modern definition of theft" without "distancing itself from the results reached under its prior standard."" *Obeya*, 884 F.3d at 445 (citing Resp. Br. at 33). The court bluntly rejected the government's argument:

> For decades, the BIA applied one rule: that a larceny offense constitutes a crime involving moral turpitude only when the larceny statute in question required … an intent to deprive the victim of property permanently. But in *Diaz-Lizarraga*, acknowledging that most states had expanded on the common law definition of larceny … the BIA decided to "update" its rule and to expand its definition of moral turpitude to cover conduct that better reflects the modern definition of larceny. The BIA thus explicitly acknowledged that *Diaz-Lizarraga* created a new rule, different from the one that it acknowledged it had followed from the Board's earliest days.

Obeya, 884 F.3d at 446 (internal citations omitted). The court further rejected the government's assertions that BIA and Court of Appeals precedents establish presumptions that 1) theft convictions involve moral turpitude, and 2) NYPL 155.25 is a CIMT. *Obeya*, 884 F.3d at 446. The *Obeya* court "reviewed those cases and [found] them unconvincing." *Id.* Of note, the Court looked at the BIA's prior opinion in *Matter of Jurado-Delgado*, 24 I. & N. Dec. 29 (BIA 2006), and found because the least-acts-criminalized under the Pennsylvania statute at issue in that case was the theft of merchandise, that created the reasonable assumption that the intended theft was permanent. *See Obeya*, 884 F.3d at 446-447. But the *Obeya* court specifically distinguished N.Y.P.L. § 155.25: "But where, as here, the categorical approach prevents the BIA from examining the property involved in the underlying offense, and the offense statute does not indicate the type of property at issue, the BIA cannot determine whether it is appropriate to presume an intent to permanently deprive." *Obeya*, 884 F.3d at 447. The court continued: "New York Penal Law § 155.25 is not limited to any specific type of property, and so the BIA's presumption of an intent to deprive permanently is not relevant here." *Id.* at 447, n. 4.

Factor 3: The extent to which the party against whom the new rule is applied relied on the former rule. The court found that it was reasonable for Mr. Obeya, and similarly situated noncitizens, to have relied on the BIA's existing rule in pleading guilty under § 155.25, and held that "reasonable reliance" rather than "actual reliance" is the relevant standard. The court wrote:

> We therefore take this opportunity to clarify that, when conducting retroactivity analysis in the immigration context, we look to whether it would have been reasonable for a criminal defendant to rely on the immigration rules in effect at the time that he or she entered a guilty plea. In doing so, we join the Seventh Circuit's

> considered holding that, in determining the retroactive effect of an agency's immigration rules, "the critical question is not whether a party actually relied on the old law, but whether such reliance would have been reasonable." *Velasquez-Garcia v. Holder*, 760 F.3d 571, 582 (7th Cir. 2014). It was eminently reasonable for Obeya, in entering a guilty plea to a charge of petit larceny, to rely on seven decades of BIA precedent, reinforced by this Court in *Wala* [*v. Mukasey*, 511 F.3d 102 (2d Cir. 2007) (Sotomayor, J.)] holding that larceny offenses involve moral turpitude only when a permanent taking is intended.

Obeya, 884 F.3d at 448-449.

After finding that the BIA had a clear preexisting rule on the generic definition of a theft CIMT prior to *Diaz-Lizarraga* (*see supra* **Factor 2),** the court found that "Obeya's reliance on that precedent—the third [retroactivity] factor—follows naturally from our determination that the BIA abandoned a decades-old rule in *Diaz-Lizarraga*. 'There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions.'" *Obeya*, 884 F.3d at 448 (quoting *INS v. St. Cyr*, 533 U.S. 289, 322 (2001)).

Factor 4: **The degree of the burden which a retroactive order places on a party.** The court wrote, "[T]he first and fourth factors "are not seriously at issue in the case before us," *id.*, and both favor Obeya." *Obeya*, 884 F.3d at 445 (quoting *Lugo v. Holder*, 783 F.3d 119, 121 (2d Cir. 2015)). "And the government concedes that the fourth factor, the burden of retroactive application, favors Obeya because "removal from the United States, with life-changing consequences," is a "massive" burden for any immigrant. *Lugo*, 783 F.3d at 121; Resp. Br. at 35. All the more so for Obeya, who arrived in this country at the age of 17 and has few if any close relations in Nigeria." *Obeya*, 884 F.3d at 445.

Factor 5: The statutory interest in applying a new rule despite the reliance of a party on the old standard. The court found resoundingly this factor favored Mr. Obeya. The court found that "frequent changes in immigration law," including those that come through "judicial decisions," mean that "in many circumstances[] the immigration consequences of a conviction can depend on when a conviction occurred." *Obeya*, 884 F.3d at 449. The court rejected the government's "quixotic quest for illusory uniformity," particularly given the BIA's "willingness to depart from its own precedent." *Id.* The court then said:

> Insofar as the purpose of removal for crimes involving moral turpitude is to deport those noncitizens who have demonstrated a willingness to break certain laws reflecting on their character, it would seem that the government has no compelling interest in removing individuals for crimes that were not considered to reflect so negatively on their character at the time the offenses were committed.

Obeya, 884 F.3d at 449. The court concluded by saying that the five factors "weigh heavily in Obeya's favor" and "that the BIA erred when it retroactively applied the *Diaz-Lizarraga* standard to his removal proceedings." *Obeya*, 884 F.3d at 449.

B. Convictions under NYPL 155.25, petit larceny, entered prior to *Matter of Diaz-Lizarraga* are not CIMTs under the categorical approach.

After ruling that the BIA is not permitted to apply its new rule to theft convictions entered prior to *Diaz-Lizarraga*, the BIA held that under the "old rule" a conviction under N.Y.P.L. § 155.25 is not "a crime that categorically involves moral turpitude" because it does not "require[] an intent to deprive the owner of property permanently." *Obeya*, 884 F.3d at 449.

To reach this conclusion, the court first identified the pre-*Diaz-Lizarraga* generic definition of a theft CIMT, holding: "This Circuit has long recognized that, under BIA precedent, "ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended." *Obeya*, 884 F.3d at 447 (quoting *Wala v. Mukasey*, 511 F.3d 102, 106 (2d Cir. 2007) (Sotomayor, J.)). The court then compared this generic definition to the elements of N.Y.P.L. § 155.25. To identify the elements of § 155.25, the *Obeya* court examined two sources, as the categorical approach permits: 1) the text of N.Y.P.L. § 155.25 ("A person is guilty of petit larceny when he [or she] steals property."); and 2) the text of N.Y.P.L. §§ 155.05(1)-(4) and 155.05, which provide the legal definitions for § 155.25. Proceeding through these statutory provisions, the court followed this logic:

- Under § 155.05(1), stealing requires an intent to deprive or appropriate; and
- Under § 155.00(3), the deprivation need not be permanent; and
- Under § 155.00(4) the appropriation need not be permanent.

Obeya, 884 F.3d at 449-450. The court concluded: "[u]nder New York law, then, neither the definition of "deprive" nor that of "appropriate" is limited to a permanent deprivation." *Id.* at 449. "Applying the categorical approach, and the BIA's pre-*Diaz-Lizarraga* standard for larceny crimes involving moral turpitude," the court found "that the BIA erred when it found that Obeya's larceny conviction constituted a" CIMT. *Id.* at 450.

III. *OBEYA*'S BROADER IMPLICATIONS

A. Under *Obeya*, other New York larceny and stolen property offenses should not be found to be CIMTs.

Grand larceny offenses

The *Obeya* decision should also mean that other New York larceny convictions entered prior to *Diaz-Lizarraga* that use the same definitions of "deprive" and "appropriate" as N.Y.P.L. § 155.25 should not be found to be CIMTs. Grand larceny offenses found at N.Y.P.L. §§ 155.30, 155.35, 155.40, 155.42 all use the same definitional provisions as § 155.25—they derive their meaning from N.Y.P.L. §§ 155.05(1), 155.00(3), and 155.00(4), none of which requires an intent to permanently deprive.

However, practitioners should be aware that the *Obeya* court discussed BIA case law issued years prior to *Diaz-Lizarraga* where the BIA found it could presume an intent to permanently deprive in certain theft statutes depending on the "nature and circumstances" of the

theft. *Obeya*, 884 F.3d at 446-447 (*quoting Matter of Jurado-Delgado*, 24 I. & N. Dec. 29, 33 (BIA 2006) (internal quotation marks omitted)). In *Jurado-Delgado*, the BIA found a Pennsylvania retail theft statute created a presumption of an intent to permanently deprive because the statute criminalizes the theft of merchandise. In *Matter of Grazley*, 14 I. & N. 330, 333 (BIA 1973), the BIA drew the same conclusion because the statute at issue criminalized the theft of cash.

Thus, in removal proceedings, DHS may argue that the elements of some New York grand larceny offenses trigger a similar permanent taking presumption based on the property at issue in the least-acts-criminalized under those larceny statutes. *E.g.*, N.Y.P.L. §§ 155.30(2)-(4), (7)-(11) (grand larceny provisions criminalizing the theft of certain kinds of property). Removal defense lawyers can argue, at a minimum, that the property at issue in these provisions is distinguishable from the merchandise at issue in *Jurado-Delgado* or cash at issue in *Grazley*. For example, N.Y.P.L. § 155.30(4) penalizes the theft of property where the property involved is a credit card or debit card. In defending against a CIMT charge based on conviction under this provision, removal defense lawyers can invoke *Obeya* to argue that, even assuming *Jurado-Delgado* to have survived the Supreme Court's clarification of the categorical approach in *Descamps*, a credit card or debit card does not support an assumption of permanent theft in the way that cash or merchandise do. For provisions like N.Y.P.L. § 155.30(1), which punishes the theft of property valued over $1,000.00, removal defense lawyers can argue that "the categorical approach prevents the BIA from examining the property involved" in this offense of conviction "and the offense statute does not indicate the type of property at issue, [thus] the BIA cannot determine whether it is appropriate to presume an intent to permanently deprive." *Obeya*, 884 F.3d at 447. That property is valued above a certain dollar amount does not bring a statute within the ambit of *Jurado-Delgado* or *Grazley*, for in those cases it was the specific identity of the property taken that allowed the BIA to assume an intent to permanently deprive. Joyriding statutes, which are found in state penal laws throughout the country, provide a useful example for the temporary theft of an expensive item—a car—and courts routinely find these convictions do not constitute CIMTs. *See, e.g.*, *Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016) (en banc).

Stolen property offenses

The *Obeya* decision provides new authority for removal defense lawyers to argue that certain New York offenses criminalizing the possession of stolen property should also be examined under *Obeya*'s holdings on the distinction between temporary and permanent takings. In 2000, the Second Circuit deferred to the BIA's holding that N.Y.P.L. § 165.40, criminal possession of stolen property in the fifth degree, is categorically a CIMT. *See Michel v. INS*, 206 F.3d 253 (2d Cir. 2000) (citing *Matter of Salvail*, 17 I. & N. Dec. 19, 20 (BIA 1979)). However, the court in *Michel* did not consider whether the generic definition of a possession of stolen property CIMT requires a permanent taking, and so removal defense lawyers can point this out to argue that *Michel* is not contrary authority on whether, to constitute a CIMT, an offense for possession of stolen property requires an intent to permanently deprive. *See Brecht v. Abramson*, 507 U.S. 619, 631 (1993). In the Ninth Circuit, for instance, the court in *Castillo-Cruz v. Holder* considered the temporary/permanent distinction in the context of stolen property offenses, and found that "if an intent to deprive permanently is necessary to find an act of theft morally turpitudinous, the same principle would appear to apply to the receipt of stolen property." 581 F.3d 1154, 1160 (9th Cir.

2009). This argument is particularly strong for challenging N.Y.P.L. § 165.40 (A-misdemeanor, criminal possession of stolen property in the fifth degree), as § 165.40 does not specify the nature or value of the property involved in conviction. Convictions under N.Y.P.L. §§ 165.45, 165.50, 165.52, and 165.54 are also vulnerable to attack under *Obeya*, though removal defense lawyers should consider the effect of the *Obeya* court's discussion of *Matter of Jurado-Delgado* and *Matter of Grazley* (*see supra* Part III.A.), as these provisions are specific about the nature or value of stolen property possessed. In attacking these provisions under *Obeya*, removal defense lawyers may look to N.Y.P.L. §§ 165.55 and 165.60, which present the defenses and presumptions available in prosecutions for possession of stolen property in New York.

B. As clarified by *Obeya*, the BIA should not be permitted to retroactively apply new rules on criminal deportability.

As detailed above (*see* Part I.A. *supra*), the *Obeya* decision creates strong arguments against the retroactive application of new deportability rules created through administrative adjudication—specifically, decisions issued by the BIA, or by the Attorney General through the certification process. If the BIA continues to reverse its longstanding positions on deportability rules, as it did in *Diaz-Lizarraga* and *Obeya*, removal defense lawyers should argue that under the five-factor retroactivity test applied and strengthened in *Obeya*, neither IJs nor the BIA are not permitted to apply those new rules retroactively.

The *Obeya* decision is strong on each of the five retroactivity factors, and in particular it strengthens the third factor, by clarifying that the applicable reliance standard is whether it would have been "reasonable" for an immigrant to rely on an existing rule at the time of a guilty plea, rather than whether the immigrant "actually" relied on the existing rule at the time of the guilty plea. Under this clarified standard, removal defense lawyers should look hard into whether any past or future BIA decisions might involve a rule change, and then assert reasonable reliance under *Obeya*'s retroactivity test.

C. *Obeya* affirms application of a strong categorical approach under Supreme Court and Second Circuit case law, and provides support for applying an "express language" rule for identifying a criminal statute's minimum conduct without the need for a further "realistic probability showing."

While the issue was not squarely presented or challenged in *Obeya*, the court's decision affirms the application of a strict, elements-based categorical approach, and relies exclusively on the statutory text of the N.Y.P.L. in identifying the least-acts-criminalized under § 155.25.

In footnote 4 of the *Obeya* opinion, the court stated: "Though not at issue in this appeal, the categorical approach plays an important role in Obeya's case, and it requires brief explication." The court then went on to explain how the categorical methodology works, focusing largely on the Supreme Court's guidance from *Descamps v. United States*, 570 U.S. 254 (2013).

Notably, in conducting the categorical analysis the court did not see any need to conduct a realistic probability analysis in seeking to identify the least-acts-criminalized under N.Y.P.L. §

155.25. The court identified the minimum conduct by looking exclusively at the express language of the statutory text. *See Obeya*, 884 F.3d at 449 (citing N.Y.P.L. §§ 155.25, 1550.05(1), 155.00(3)-(4)). *See also id.* at 450 n.9 (discussing statutory text and judicial decisions interpreting that text as possible sources for identifying "the reach of" a state statute, and still not discussing the realistic probability standard). The *Obeya* court did not indicate any need for further proof of prosecutions or convictions for non-permanent deprivations under § 155.25. That the express language of the New York statutes covers non-permanent takings was sufficient for the *Obeya* court to find that the least-acts-criminalized under § 155.25 do not involve an intent to deprive permanently. For removal defense lawyers litigating categorical approach cases in the Second Circuit, the *Obeya* opinion provides support for the express language rule adopted by the First, Third, Fourth, Ninth, and Eleventh Circuits.[3]

D. *Obeya* leaves open the questions of whether the BIA's new rule adopted in *Diaz-Lizarraga* is correct or permissible, and whether under the new standard a conviction under § 155.25 or other new York theft-related offenses is categorically a CIMT.

The *Obeya* court did not consider or decide whether the BIA's new generic definition of a CIMT theft offense is correct, permissible, or deserving of deference (assuming the *Chevron* framework would apply). Thus, for convictions under N.Y.P.L. § 155.25 and other theft and stolen property offenses entered after November 16, 2016, removal defense lawyers should maintain challenges against the new rule itself. *See, e.g.*, *Leyva Martinez v. Sessions*, No. 17-1301 (4th Cir. 2018, *argued* Dec. 6, 2017).

The *Obeya* court also expressly left open the question of whether conviction under § 155.25 is categorically a CIMT under the Board's new generic definition of a CIMT theft offense. *See See Obeya*, 884 F.3d at 445, n.1. For § 155.25 convictions entered after November 16, 2016 when the BIA issued *Matter of Diaz-Lizarraga*, removal defense lawyers should argue that the least-acts-criminalized under N.Y.P.L. § 155.25 (and other New York larceny and stolen property offenses) fall beyond the new CIMT theft offense generic definition that includes both permanent takings and the substantial erosion of property rights.[4] New York larceny and stolen property offenses include the appropriation of property; New York's definition of "appropriation" includes takings that are neither permanent nor substantially erode property rights. *See* N.Y.P.L. § 155.00(4)(b). The *Obeya* court noted the BIA's acknowledgment that New

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[3] *See U.S. v. Salmons*, 873 F.3d 446 (4th Cir. 2017); *Swaby v. Yates*, 847 F.3d 62 (1st Cir. 2017); *Chavez-Solis v. Lynch*, 809 F.3d 1004, 1009-10 (9th Cir. 2015) (citing *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc)); *Ramos v. U.S. Atty. Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013); *Jean-Louis v. Attorney General of the U.S.*, 582 F.3d 462, 481 & n.23 (3d Cir. 2009). *See also Mendieta-Robles v. Gonzales*, 226 F.App'x 564, 572-73 (6th Cir. 2007) (unpublished). *But see United States v. Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017) (en banc) (rejecting the express language rule, and imposing an "actual case" requirement to identify the minimum conduct punishable under a statute).

[4] This argument is fully developed in Mr. Obeya's opening brief to the Second Circuit, which is available on IDP's website at https://www.immigrantdefenseproject.org/wp-content/uploads/Obeya-opening-brief.pdf.

York's definition of appropriation of property by its "plain language . . . does not require a showing that a permanent deprivation or substantial erosion of property rights was intended." *Obeya*, 884 F.3d at 444. Addressing the New York State Court of Appeals decision in *People v. Medina*, 18 N.Y.3d 98 (2011), which the BIA interprets as narrowing the definition of "appropriate" to require at least a substantial erosion of property rights, the *Obeya* court noted that it is an open question whether, when applying the categorical approach, it is appropriate to look beyond the language of the statute to judicial interpretations to determine the reach of the statute. *Obeya*, 884 F.3d at 450, n.9.