No. B184869

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

KENNETH G. PETRULIS, Personal Representative of the
ESTATE OF DAN K. STEVENSON, Deceased,

Plaintiff-Respondent,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA
and PRUCO LIFE INSURANCE COMPANY,

Defendant-Appellant

From the Order of the Los Angeles County Superior Court
Case No. BC296439
Honorable Victor H. Person

MOTION OF THE AMERICAN COUNCIL OF LIFE INSURERS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA AND PRUCO LIFE INSURANCE COMPANY

MAYER, BROWN, ROWE & MAW LLP

Donald M. Falk (SBN 150256)
2 Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306
Tel: (650) 331-2000
Fax: (650) 331-2060

Elizabeth G. Oyer (SBN 237941)*
1909 K Street, NW
Washington, DC 20006
Tel: (202) 263-3000
Fax: (202) 263-3300

* Admitted in California only.

Pursuant to Rule 13(c) of the California Rules of Court, the American Council of Life Insurers ("ACLI") moves this Court for leave to file the accompanying brief as *amicus curiae* in support of appellants Prudential Life Insurance Company of America and Pruco Life Insurance Company.

ACLI is the largest life insurance trade association in the United States, representing the interests of 377 member life insurers, 297 of which do business in California. ACLI member companies account for 91% of the total assets, 90% of the life insurance premiums, and 95% of the annuity considerations in the United States among legal reserve life insurance companies. ACLI's members play an equally significant role within California, where they provide 89% of all life insurance coverage.

Accordingly, ACLI has a substantial interest in seeing that the unprecedented and unsound judgment of the trial court in this case is reversed. The novel application of Probate Code § 859 in the trial court exposes all ACLI member companies providing life insurance in California to double—or even triple—liability in any case in which they deny benefits pursuant to the terms of a contract for life insurance.

ACLI's brief will assist the Court in deciding this matter. See Cal. R. Ct. 13(c)(2). As the principal trade association for life insurers in California and nationwide, ACLI is uniquely able to attest to the novelty and lack of historical foundation for the trial court's application of Probate

Code § 859. ACLI's brief will assist the Court by tracing the evolution of this statutory double-recovery provision throughout its more than 150-year history. ACLI's brief explains how the trial court's use of section 859 is inconsistent with any previous application of the statute and dramatically expands the scope of double recovery beyond anything ever intended by the Legislature. Accordingly, ACLI respectfully requests that the Court grant leave to file the accompanying brief of *amicus curiae*.

Respectfully submitted.

____

Donald M. Falk (SBN 150256)
MAYER, BROWN, ROWE & MAW LLP
2 Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306
Tel: (650) 331-2000
Fax: (650) 331-2060

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MAYER, BROWN, ROWE & MAW LLP

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2 Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306
Tel: (650) 331-2000
Fax: (650) 331-2060

Elizabeth G. Oyer (SBN 237941)*
1909 K Street, NW
Washington, DC 20006
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Fax: (202) 263-3300

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IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

The American Council of Life Insurers ("ACLI") is the largest life insurance trade association in the United States, representing the interests of 377 member life insurers, 297 of which do business in California. ACLI member companies account for 91% of the total assets, 90% of the life insurance premiums, and 95% of the annuity considerations in the United States among legal reserve life insurance companies. In California, 89% of life insurance coverage is provided by ACLI members.

The novel application of Probate Code § 859 permitted by the trial court exposes all ACLI member companies providing life insurance in California to double—or even triple—liability in any case in which they deny benefits pursuant to the terms of a contract for life insurance. Accordingly, ACLI has a substantial interest in seeing that the unprecedented and unsound judgment of the trial court is reversed.

SUMMARY OF THE ARGUMENT

Probate Code § 859 is a statute with a long history, some version of it having been on the books since at least 1851.[1] During this last century and a half, the language has seen numerous revisions and the provision has been moved around the Probate Code pursuant to periodic reorganizations. What has remained constant is the provision's limited application to cases in which an individual *wrongfully removes* property from the estate of a

[1] Stats. 1851, ch. 124, § 116.

decedent and *converts* it to his own use. In effect, § 859 and its predecessors merely enhance the damages available for acts of wrongful conversion when property converted is taken from the estate of a decedent.

Never in its lengthy history has § 859 been construed to apply, as here, to what is essentially a dispute over contract construction. Plaintiff suggests that an insurer's denial of a claim based on the terms of a life insurance contract that was owned by a person other than the insured/decedent and that included a suicide exclusion clause constitutes a wrongful taking of property belonging to the estate of the decedent. However, under the contract, any funds available for payment—even if the claim for death benefits had been approved—would never have been paid to, or possessed by, the estate. To find that Prudential "wrongfully removed" any funds that might have been—but were not—owing to the estate would be to contort the scope of § 859 far beyond any prior application of the provision, to the detriment of all life insurers operating in California and with the prospect of unintended consequences for all other contractual disputes related to a decedent.

It is significant that, in the court below, plaintiff did not characterize Prudential's alleged action as a "taking" of insurance proceeds belonging to the designated beneficiaries. Rather, plaintiff has characterized the alleged wrongful action as a conversion of a chose in action belonging to the estate. A chose in action, however, is a type of property that is simply not

susceptible to conversion (that is, a chose in action cannot be taken away from its rightful owner and put to the use of another). In any event, the initiation of this litigation is itself evidence that the estate remained in possession of, and exercised, its chose in action. Whatever legal claim the estate may have had based on Policy 299, it continued to have, intact and "uncontroverted," even after Prudential declined to pay benefits under the policy. Accordingly, lacking any action by Prudential that was not contemplated by the terms of the contract and in the absence of any "chose in action" that the estate has not already exercised, § 859 is inapplicable in this matter.

ARGUMENT

I. THE LONG HISTORY OF § 859 MAKES CLEAR THAT THIS PROVISION DOES NOT APPLY TO CLAIMS FOR UNPAID INSURANCE PROCEEDS, BECAUSE THOSE PROCEEDS ARE NOT PAYABLE TO THE DECEDENT'S ESTATE.

The history of § 859 and its predecessors illustrates that double recovery is available in only a narrow subset of probate cases involving the wrongful removal of property from a decedent's estate. Case law interpreting the original statute, Probate Act § 116, established that the conduct to be penalized by double recovery was the "wrongful conversion of … property, for which an action of trover was maintainable at common

law."[2] *Jahns v. Nolting* (1866) 29 Cal. 507, 511; *see also Beckman v. McKay* (1859) 14 Cal. 250, 252 (characterizing an action under Probate Act § 116 as "in the nature of an action of trover and conversion"). The double damages provision was not intended to "give a new right of action, nor create a remedy where one did not previously exist, but it merely increases the measure of damages, in case the tortious conversion has been committed at a particular time when the property is peculiarly exposed to loss." *Jahns*, 29 Cal. at 511.[3]

In determining the instances of conversion for which double recovery was available, the Supreme Court emphasized "the manner in which the defendant came into possession of the property," explaining that "if the defendant came into possession innocently, and for a lawful purpose, or under a *bona fide* claim or color of right, or in ignorance of the title, the statute—which is penal in its character—would not be so construed as, by

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[2] Probate Act § 116 provided: "If any person, before the granting of letters testamentary or of administration, shall embezzle or alienate any of the moneys, goods, chattels, or effects, of any deceased person, he shall be liable to the action of the administrator, for double the value of the property so embezzled or alienated." Stats. 1851, ch. 124, § 116. Probate Act § 116 was recodified at § 1458 of the Code of Civil Procedure. Amended Stats. 1907, ch. 265, § 1.

[3] The period of particular vulnerability to which the Court referred was "the time intermediate the death of the deceased and the issuing of the letters of administration." *Jahns*, 29 Cal. at 511. The early version of the double damages provision applied only to acts of conversion occurring prior to the appointment of an administrator. *See id.* Subsequent versions of the statute abandoned that temporal limitation.

mere force of a demand, and refusal or inability of compliance, to bring the defendant within the penalty." *Beckman*, 14 Cal. at 252-53. The Court held, as a matter of law, that a mere refusal to surrender property claimed by the estate of a decedent was, in itself, insufficient to invoke the double recovery provision then codified at Probate Act § 116. *Id.* at 253. The Court explained that simply "assuming that mere demand and refusal constitute a conversion" is "patent error" and that a jury charge suggesting as much is grounds for reversal of a judgment on a § 116 claim. *Id.* As the Ninth Circuit has observed, *Beckman* established that the double damages provision, "*being penal, would be strictly construed, so as not to include a retention of possession under claim of right*." *Regional Agric. Credit Corp. v. Chapman* (9th Cir. 1942) 129 F.2d 435, 437 (emphasis added).

Accordingly, cases applying the earliest predecessor to § 859 all involve situations in which a party took property out of a decedent's estate and converted it to his own use. *E.g.*, *Beckman*, 14 Cal. at 252 (defendant took unspecified property from decedent's estate); *Jahns*, 29 Cal. at 509 (defendant took certain chattels, money, and rents from the estate); *Levy v. Superior Court* (1895) 105 Cal. 600 (decedent's business partner took money and other property from the estate); cf. *Stoddard v. Newhall* (1905) 1 Cal.App. 111 (decedent's mother took articles of personal property, including a set of tools, from the estate; court remanded for new trial to

resolve mother's claim that she owned the tools, noting that propriety of double recovery hinged on this issue).

Section 612 of the Probate Code replaced the original double recovery statute in 1931, but it continued to be invoked exclusively in cases involving allegations of wrongful removal and conversion of property from the estate of a decedent.[4] *E.g.*, *Sperry v. Tammany* (1951) 106 Cal.App.2d 694 (claim based on husband's alleged wrongful removal of articles of personal property from home he had shared with deceased wife); *Kreher v. Culbertson* (1951) 107 Cal.App.2d 831 (action based on defendant's alleged use of undue influence to convert to his own use properties belonging to decedent). Because § 612 removed the temporal limitation confining double recovery to cases in which property was taken prior to the appointment of an administrator, many of the cases in which it was applied involved embezzlement by the administrator himself. *E.g.*, *Hill v. Superior Court* (1940) 16 Cal.2d 527 (action to recover money allegedly embezzled by former administrator); *Hochwender v. Carter* (1941) 45 Cal.App.2d 435 (action to recover money embezzled from estate by former executor); *In re Estate of Harvey* (1964) 224 Cal.App.2d 555 (action to recover money that executor commingled with his own and appropriated to his own use). In

[4] Section 612, enacted in 1931, provided: "If any person embezzles, conceals, smuggles or fraudulently disposes of any property of a decedent he is chargeable therewith and liable to an action by the executor or administrator of the estate for double the value of the property, to be recovered for the benefit of the estate." Stats. 1931, ch. 281, § 612.

any event, the bright-line rule always has been that the defendant had to have removed property of the estate for liability to attach.

Perhaps most illuminating is the Court of Appeal's opinion in *Bogan v. Wiley* (1949) 90 Cal.App.2d 288. The administrator of a decedent's estate sought a double recovery under § 612, alleging that the defendant fraudulently appropriated to his own use a check for $12,000 written to the decedent. *Id.* at 291-92. However, because the check was never delivered to the decedent, the Court found § 612 inapplicable, explaining: "Since title to the check was neither vested in, nor held by defendant for, [decedent] or her estate it never became her property or that of her estate. *If it was not property of [decedent] or her estate it could not be embezzled, concealed, smuggled or fraudulently disposed of within the meaning of Probate Code, section 612, since by it terms that section applies only to 'any property of a decedent*.'" *Id.* at 292 (emphasis added).

In other words, the double damages provision applies only to property that was *in* the decedent's estate and was subsequently and wrongfully *removed* from it. Property cannot be removed from the estate if the estate neither possessed nor had title to it, and double recovery is unavailable.

Recent case law applying the present version of the double damages provision, Probate Code § 859, reaffirms that the provision "deals with recovery of property improperly *removed* from" an estate. *In re Pereira &*

Melo Dairy (E.D. Cal. 2005) 325 B.R. 1, 2 (emphasis added). Section 859 states, in relevant part: "If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to the estate of a decedent, conservatee, minor, or trust, the person shall be liable for twice the value of the property recovered by an action under this part." Prob. Code § 859.[5] Because the legislative history to this section indicates

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[5] Section 612 was amended in 1988 to add language explicitly limiting its application to cases in which property was taken in bad faith. The revised provision, codified at Probate Code § 8874, provided for double recovery against a person "who, in bad faith, has wrongfully taken, concealed, or disposed of property in the estate of the decedent." Stats. 1988, ch. 1199, § 82.5. Case law applying § 8874 is virtually nonexistent. However, the legislative history explains that § 8874 merely "restates former Section 612 with the addition of a bad faith limitation" (19 Cal. L. Rev. Comm'n Reports 769 (1988)), suggesting that the modification was not intended to have any other substantive effect.

In 1994, § 8874 was recodified as Probate Code § 9869. Stats. 1994, ch. 806, § 32. The legislative history explains only that § 9869 was part of a bill "mak[ing] technical and grammatical changes to various Probate Code provisions." Cal. Bill Analysis, A.B. 3686 Sen. (Aug. 16, 1994). Case law applying § 9869 is sparse, but entirely consistent with the cases applying previous versions of the double recovery provision. For example, in *American Contractors Indemnity Co. v. Saladino* (2004) 115 Cal.App.4th 1262, although the application of § 9869 was not before the Court of Appeal, the Court nevertheless noted that the trial court had awarded double damages under that section against a former administrator who, in bad faith, withdrew money from estate accounts and sold stock belonging to the estate, taking assets worth over $364,000. *Id.* at 1265-66.

In 2001, § 9869 became § 859. As the legislative history makes clear, § 859 merely consolidated like provisions of the Probate Code dealing with estates of decedents, conservatees, wards, and trusts. See Cal. Legis. Serv. ch. 49 (S.B. 669) (West); Cal. Bill Analysis, S.B. 669 Sen. (Mar. 20, 2001); Cal. Bill. Analysis, S.B. 669 Assem. (June 12, 2001) (explaining that "[t]his non-controversial bill consolidates separate probate code provisions regarding property claims against estates of decedents,

no intent to change the substance or scope of the double recovery provision, at least one court has concluded that the language "property belonging to the estate" "is simply another way of saying 'property in the estate'" as used by § 859's predecessor. *Pereira*, 325 B.R. at 4.

Part 19 of the reorganized Probate Code, which includes §§ 850 through 859, "is a coherent scheme designed to allow guardians, conservators, executors, or trustees to recover assets which should be part of the relevant estate but which are not because they were transferred improperly." *Id.* at 4-5. Section 850 authorizes the personal representative of a decedent's estate to petition the court for an order directing a conveyance of wrongfully held property in a number of circumstances, including when "the decedent died having a claim to real or personal property, title to or possession of which is held by another." Prob. Code § 850(a)(2)(D). In other words, § 850 permits the personal representative "to sue third parties to recover property allegedly belonging to the" estate. *Pereira*, 325 B.R. at 5. If, after holding a hearing on the matter, "the court is satisfied that a conveyance, transfer, or other order should be made, the court shall make an order authorizing and directing the personal representative or other fiduciary, or the person having title to or possession of the property, to execute a conveyance or transfer to the person entitled

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minors and conservatees, and trusts, creating a single procedure for the trial of all property questions within the probate court's jurisdiction").

thereto, or granting other appropriate relief." Prob. Code § 856. In those cases in which the court orders the return of property wrongfully and in bad faith taken from the estate, double damages are available under § 859.

Under this structure, the essential prerequisites to double recovery under § 859 are (1) that the subject property at one time was *in the estate* of the decedent, and (2) that subsequently it was *removed* from the estate. *See Pereira*, 325 B.R. at 5 (explaining that a determination that property was defectively transferred out of the estate is a prerequisite to the imposition of double damages under § 859). The insurance proceeds sought here were never in the decedent's estate, and thus could not have been removed from it. It is undisputed that benefits were never paid—to the estate or otherwise—under Policy 299. Accordingly, they could not be removed from the estate. To state a claim for wrongful conversion of property, a plaintiff "must establish an actual interference with his *ownership or right of possession*." *Ananda Church of Self-Realization v. Mass. Bay Ins. Co.* (2002) 95 Cal.App.4th 1273, 1282 (emphasis in original) (quoting *Moore v. Regents of Univ. of Cal.* (1990) 51 Cal.3d 120, 136). Where, as here "plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion." *Ananda*, 95 Cal.App.4th at 1282 (emphasis and omission in original) (quoting *Moore*, 51 Cal.3d at 136). Unpaid sums—even if properly owed

to the estate—simply cannot be *removed* from the estate so as to create liability under § 859.

A further barrier to liability under § 859 in cases involving insurance proceeds is that the personal representative of an estate has no authority to initiate an action to collect the proceeds of an insurance policy, unless the estate itself is the beneficiary. It is well settled that life insurance proceeds are paid directly to the named beneficiary, not to the decedent's estate. See, *e.g.*, 25 Cal.Jur.3d Decedents' Estates § 904 ("The proceeds of an insurance policy on the life of the decedent under the terms of which the beneficiary named is some person other than the representative in his or her representative capacity, form no part of the estate of the insured."); *In re Estate of Ward* (1932) 127 Cal.App. 347, 359; *Pezzola v. Pezzola* (1980) 112 Cal.App.3d 752, 757. Accordingly, any effort by the personal representative to take possession of the insurance proceeds generally exceeds the scope of his administrative authority. "A representative cannot administer on property that does not constitute an asset of the estate, having no right to administer such property as does not belong to the estate." 5 Cal.Jur.3d Decedents' Estates § 924 (footnotes omitted); see also, *e.g.*, *Hollyfield v. Geibel* (1937) 20 Cal.App.2d 142, 148. If the administrator acquires such property, it "should be removed from the representative's possession, and surrendered to the proper party." 5 Cal.Jur.3d Decedents' Estates § 924.

With respect to life insurance proceeds specifically, estate administrators "have no right as such to receive the proceeds of a policy payable to another person, including a decedent's spouse, as any part of the estate of the decedent." 25 Cal.Jur.3d Decedents' Estates § 904. If an administrator does somehow acquire the proceeds of an insurance policy whose named beneficiary is other than the estate itself, those proceeds will not go into the estate; rather, the administrator will be considered to hold the funds not in his official capacity as estate administrator, but as an agent or trustee for the beneficiary.[6]

Accordingly, a claim for payment of insurance benefits other than to the estate is simply not within the scope of actions the personal representative is authorized to bring under Part 19 of the Probate Code. Before double damages may be awarded, the representative must "first prevail under Section 850." *Pereira*, 325 B.R. at 5; *see also* Ross & Grant,

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[6] See, *e.g.*, *Nickals v. Stanley* (1905) 146 Cal. 724, 725 (when administrator collected insurance proceeds payable to wife of deceased, "such proceeds were in no sense property of the estate, and were not received by him in the discharge of any official duty as administrator"; rather, the funds were "the property of the widow, and [the administrator] was simply her agent or trustee in regard thereto"); *Heydenfeldt v. Jacobs* (1895) 107 Cal. 373, 377 (executors who collected insurance proceeds had no authority to do so in their capacity as executors, and thus became trustees for the named beneficiaries); 5 Cal.Jur.3d Decedents' Estates § 924 ("The representative has no right as such to collect the proceeds of an insurance policy that is not an asset of the estate; and if he or she does so, he or she holds the proceeds simply as the agent or trustee for the benefit of the beneficiary, who may bring an action against the representative personally for their recovery or, if the representative has expended them to defray expenses of the estate, for conversion.") (footnotes omitted).

Cal. Prac. Guide Probate, § 15:351.1 (double damages under § 859 "are recoverable in § 850 proceedings from the persons who in 'bad faith' deprived the estate of" property). However, the personal representative cannot bring an action under § 850 to recover property he has no authority to collect, and thus cannot satisfy a basic prerequisite to double recovery under § 859. Cf. *O'Neal v. O'Neal* (1933) 176 Ga. 418 (dismissing claim against decedent's brother under Georgia double recovery statute for wrongfully converting proceeds of decedent's life insurance policy, because complaint failed to identify the beneficiary of the policy).

Plaintiff tries to get around this basic problem by claiming to be acting upon rights *assigned* to him by the designated beneficiaries of Policy 299. The trouble with this gambit is that the beneficiaries were capable of assigning only those rights that *they themselves* possessed, which *did not include the right to recover double damages under § 859*. An assignment "carries with it all rights of the assignor" (1 Witkin, Summary 10th (2005) Contracts, § 734), and, conversely, an "assignee only obtains the right which the assignor herself had" (*Miller & Desatnik Mgmt. Co. v. Bullock* (1990) 221 Cal.App.3d Supp. 13, 18). See also, *e.g.*, *Smith v. State Farm Mut. Auto. Ins. Co.* (1992) 5 Cal.App.4th 1104, 1111 (an insured's assignee "stands in [the insured's] shoes, possessing the rights which the insured had against the insurer") (citation and internal quotation marks omitted); *Woolett v. Am. Employers Ins. Co.* (1978) 77 Cal.App.3d 619, 625

(insured's assignee "stands in [assignor's] shoes and is subject to any defenses which defendant had against [assignor] prior to notice of the assignment").

The named beneficiaries of Policy 299 possessed, at most, a contractual claim to the proceeds of that policy. They did not have a right of action under the Probate Code, because the property they sought to recover was their own personal property, not property belonging to the estate. Thus, even if Prudential wrongfully denied payment of policy benefits, and even if that denial amounted to a wrongful taking of property, Prudential wrongfully took property belonging to the policy beneficiaries, not to the estate of a decedent. Assignment agreements have many valid purposes, but expanding the liability of a third party is not one of them. Cf. *id.* § 728 ("The right to recover a statutory penalty is not assignable."); *Hochwender*, 45 Cal.App.2d at 437 (the double recovery authorized under § 859 is a statutory penalty). Because the beneficiaries never held any right to recover double damages under § 859, they were not capable of conveying such a right to the Personal Representative by assignment, and, consequently, the Personal Representative never acquired that right.

II. PLAINTIFF'S RECHARACTERIZATION OF THE PROPERTY ALLEGEDLY TAKEN AS A "CHOSE IN ACTION" DOES NOT BRING HIS CLAIM WITHIN THE AMBIT OF § 859, BECAUSE A CHOSE IN ACTION CANNOT BE CONVERTED.

Tacitly conceding that the policy benefits themselves were never "property" of the estate, plaintiff argues instead that the property at issue is a chose in action— the estate's legal *claim* to the benefits. That label is inadequate to support the verdict.

A chose in action is "[t]he right to bring an action to recover a debt, money, or thing." Black's Law Dictionary (8th ed. 2004). "A 'chose in action,' also known as a 'thing in action,' in its classic sense is a legal claim; that is, something on which an 'action' or lawsuit might be founded. It is frequently described in terms of a right to bring an action, or a right to receive or recover a debt, money, or damages by a judicial proceeding." 73 C.J.S. Property § 5 (footnotes omitted).

The right to bring a legal action—whether to receive the proceeds of an insurance policy or to collect some other debt—cannot be wrongfully "taken, concealed or disposed of" by a third party. See *Bogan*, 90 Cal.App.2d at 293 ("No person can embezzle, smuggle or fraudulently dispose of another's right of action to recover a debt . . . ."). Because an action for double recovery under the Probate Code is "in the nature of an action of trover and conversion" (*Beckman*, 14 Cal. at 252), the subject property must be capable of being converted. Conversion "presupposes the

existence of tangible goods or chattels in a form capable of being changed or transformed, turned over, delivered, or appropriated for the use and benefit of the wrongdoer." *Olschewski v. Hudson* (1927) 87 Cal.App. 282, 286; see also, *e.g.*, *Melchior v. New Line Prods., Inc.* (2003) 106 Cal.App.4th 779, 792; *Franklin v. Municipal Court* (1972) 26 Cal.App.3d 884, 901.

A party's legal rights are simply not this sort of property. No manipulation or misconduct by the obligor can erase a sum legitimately owed or cancel the obligee's right to insist on payment. Indeed, it was on precisely this ground that the *Bogan* Court found § 612 inapplicable to a claim for double damages arising out of the defendant's alleged embezzlement of a debt owed the decedent, reasoning: "If the partnership owed [decedent] or her estate $12,000 before the check was drawn and its proceeds appropriated by defendant, it continued to owe her $12,000 afterwards. The debt had not been paid and it could not be cancelled by any such legerdemain." *Bogan*, 90 Cal.App.2d at 292. Here, likewise, if the beneficiaries of Policy 299 were entitled to collect its proceeds before Prudential denied payment, the same sum is owed afterwards, and no "legerdemain" by Prudential could possibly extinguish their legal rights.

The very fact of the litigation here is perhaps the best evidence that plaintiff's chose in action remains intact. In bringing this suit to recover the proceeds of Policy 299, plaintiff is asserting the very chose in action of

which it claims to have been deprived. Had its chose in action somehow been extinguished, this action would be one to recover the chose in action, not to recover policy proceeds and damages under § 859.

In any event, the *estate itself* possessed no chose in action with respect to the proceeds of Policy 299 apart from the one that the policy beneficiaries assigned to it. An estate can maintain only those actions that the decedent could have brought during his lifetime.[7] The very nature of a life insurance policy is that the insured cannot, during his lifetime, assert a claim to the policy's death benefit. Accordingly, Mr. Stevenson's estate had no claim to the proceeds of Policy 299 until the designated beneficiaries assigned their rights under that Policy to plaintiff. For this reason as well, plaintiff cannot establish that Prudential wrongfully deprived him of a chose in action for purposes of establishing liability under § 859.

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[7] See, *e.g.*, *Swift v. San Francisco Stock & Exch. Bd.* (1885) 67 Cal. 567, 570 (explaining that "[t]he personal representative of a decedent may maintain any action founded upon contract which could be maintained by the decedent if he were alive," which did not include an action to recover benefits payable on death to designated beneficiaries); Ross & Grant, Cal. Prac. Guide Probate, § 15:347 ("Section 850 jurisdiction may be invoked on behalf of the estate only when decedent had a 'ripened' or *enforceable* claim to the subject property *at the time of his or her death*. If something remained to be done to perfect the claim when decedent died (i.e., it was only an 'inchoate' claim at best), there is not a sufficient 'claim' to the property to entitle the estate to bring the action.") (emphasis in original) (citing *In re Estate of Linnick* (1985) 171 Cal.App.3d 752, 761-63).

CONCLUSION

For the foregoing reasons, the judgment of the trial court under § 859 should be reversed.

Respectfully submitted.

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Donald M. Falk (SBN 150256)
MAYER, BROWN, ROWE & MAW LLP
2 Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306
Tel: (650) 331-2000
Fax: (650) 331-2060

Elizabeth G. Oyer (SBN 237941)*
MAYER, BROWN, ROWE & MAW LLP
1909 K St., N.W.
Washington, DC 20006-1101
(202) 263-3000

* Admitted in California only.

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Donald M. Falk

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Thomas P. Laffey, Esq.
J. Daniel Sharp, Esq.
1900 Avenue of the Stars, 28th Floor
Los Angeles, CA 90067

VIA OVERNIGHT DELIVERY

LAW OFFICES OF RICHARD PECH
Richard Pech, Esq.
171 Pier Avenue – Suite 327
Santa Monica, CA 90405

VIA OVERNIGHT DELIVERY

GOODSON & WACHTEL
Edward W. Wachtel, Esq.
10940 Wilshire Blvd. – Suite 1400
Los Angeles, CA 90024

VIA FIRST CLASS MAIL

Clerk of the Superior Court of Los Angeles
111 North Hill Street
Los Angeles, California 90012

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350 McAllister Street – Room 1295
San Francisco, California 94102
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