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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

NEW LIFE IN CHRIST FULL GOSPEL CHURCH CORPORATION, Cross-defendant and Appellant, v. LOS ANGELES REGIONAL FOOD BANK, Cross-complainant and Respondent.	B232701 (Los Angeles County Super. Ct. No. BC401691)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed.

McKay, de Lorimier & Acain, John P. McKay and Michael P. Acain for Cross-defendant and Appellant.

Daley & Heft, Lee H. Roistacher, Robert H. Quayle, IV and Christopher M. Busch for Cross-complainant and Respondent.

Both parties to this appeal do good deeds. Respondent Los Angeles Regional Food Bank (the Foodbank) is a charitable nonprofit corporation that distributes food to homeless and indigent families and individuals in Los Angeles. Appellant New Life In Christ Full Gospel Church (New Life) is a religious corporation that operates a church in Los Angeles and participates in distributing food to those in need as an affiliated agency of the Foodbank.

But it seems no good deed goes unpunished. (*Wright v. Beverly Fabrics, Inc.* (2002) 95 Cal.App.4th 346, 348, quoting "prominent American playwright, journalist, and political figure" Clare Boothe Luce.) In October 2008, one of New Life's volunteers, William Rodgers (Rodgers), was injured at the Foodbank's warehouse when he tripped and fell while working with other New Life volunteers to remove food and merchandise from the Foodbank's warehouse.

Rodgers filed a premises liability action against the Foodbank and 25 doe defendants. After New Life refused the Foodbank's tender of Rodgers' complaint, the Foodbank filed a cross-complaint against New Life for express and equitable indemnity, apportionment, and declaratory relief. Although Rodgers never sued New Life, New Life entered into a settlement with Rodgers pursuant to which Rodgers dismissed his complaint against the Foodbank. The Foodbank proceeded on its cross-complaint against New Life and sought recovery of its legal defense costs it incurred in defending against Rodgers' claims.

The parties filed cross-motions for summary adjudication and for summary judgment. The trial court granted the Foodbank's motion for summary adjudication on the issue of New Life's express indemnity duty, denied New Life's motion, and found that New Life had a duty to defend the Foodbank against Rodgers' claims. After a short court trial, the trial court awarded the Foodbank $62,055.19 in damages for New Life's breach of its duty to provide New Life with a defense to Rodgers' action.[1] New Life

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[1] New Life does not challenge the amount of the award.

argues on appeal that the trial court erred in ruling that New Life owed the Foodbank a duty to defend. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Foodbank receives donations of food and other merchandise, stores it in warehouses, and then makes it available to over 900 local agencies that distribute the donated goods in local communities. On September 6, 2007 Elwood Carson, the Pastor of New Life, signed an Agency Agreement with the Foodbank and a Liability Release. Carson did not have any discussions about the release with anyone at the Foodbank or with anyone else at any time. Paragraph 4 of the Liability Release provides: "[New Life] releases Foodbank from any liability resulting from the condition of the donated food, except for liability resulting from gross negligence or intentional misconduct of Foodbank. [New Life] further agrees to indemnify, defend and hold Foodbank free and harmless from and against all and any liabilities, damages, losses, claims, causes of action, suits at law or in equity or any obligation whatsoever and all costs and expenses including attorneys fees arising out of or attributed to any action of [New Life] in connection with [New Life's] storage and/or use, including distribution of donated food." This appeal involves the second sentence of paragraph 4.

Deacon Isadore Gutierrez (Gutierrez) was in charge of New Life's food pantry program and collecting food from the warehouse for New Life. Gutierrez was responsible for calling the Foodbank and finding out when church volunteers should come and pick up food, picking up the food and bringing it back to the church, preparing the food for distribution, distributing the food, returning material that belonged to the Foodbank, and gathering church volunteers to do the work. Gutierrez supervised New Life volunteers, like Rodgers, and decided where the volunteers would go and what they would do. Gutierrez was also responsible at least in part for the safety of New Life volunteers.

On October 15, 2008 Rodgers tripped and fell and injured himself on the Foodbank's premises while he was volunteering for New Life. Rodgers had been going to the Foodbank once a week on Wednesdays for eight months before the accident.

On the day of the accident, Gutierrez told Rodgers where in the Foodbank's warehouse he was allowed to go, explained to Rodgers the rules of the floor, and instructed Rodgers on what items to get and how much food to take. Gutierrez, however, did not give Rodgers any instruction on how to enter or exit the Foodbank warehouse. Gutierrez believed that Rodgers, who was one of New Life's older volunteers, was not strong enough to work on the Foodbank's front dock, loading and unloading heavy items, and several times Gutierrez had to stop Rodgers from lifting things that were too heavy for him.

The accident occurred while Rodgers was in the front dock area of the Foodbank, where agencies like New Life entered to pick up food. Jacqueline Walker (Walker), the clerk at the Foodbank in charge of the front dock, and other Foodbank employees had responsibility for organizing and placing the pallets of merchandise on the front dock. Prior to the accident, Walker saw Rodgers enter the warehouse through a "roll up" door with plastic curtains, marked as an exit, which was a violation of the Foodbank's front dock policy.

At one point Gutierrez, who was "getting some Pampers and things off a pallet" a few feet away, told Rodgers to get a cart and to put some charcoal into it. Walker heard Gutierrez yell to Rodgers, "Hurry, come, come, come."[2] Rodgers turned to go over to a pallet containing the boxes of charcoal and tripped on a ramp that led to an old scale. Rodgers stated: "I turned from the cart to get the charcoal, and when I turned to get the charcoal, I stumbled, hit [the] ramp, and went over." There were no safety cones around the scale where Rodgers fell. It is undisputed that the Foodbank owns, manages, and controls the warehouse premises.

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[2] Gutierrez denied that he had spoken to Rodgers or yelled at him to hurry up before the accident.

On November 12, 2008 Rodgers filed this action against the Foodbank. Rodgers' substantive allegations, in their entirety, were as follows: "Plaintiff was injured when he tripped on a truck ramp and fell as he was walking toward shelves in the warehouse of the Los Angeles Regional Foodbank. The ramp constituted a dangerous trip hazard due to its location and its height differential with the floor. Defendants were negligent in their failure to inspect, discover, and remedy the dangerous condition of the property they owned, managed, and maintained or controlled, and in their failure to warn plaintiff of the dangerous condition of their property. These acts or omissions by defendants, their employees, and agents caused or contributed to plaintiff's injuries and damages."[3]

On February 24, 2009 the Foodbank tendered the defense of Rodgers' complaint to New Life. New Life's insurer rejected the tender of defense, stating it had "no duty to defend or indemnify the [Foodbank] for the Rodgers action."[4]

The Foodbank filed its original cross-complaint on January 22, 2009, an amendment adding New Life as a Roe defendant on April 3, 2009, and an amended cross-complaint on August 5, 2009. The Foodbank asserted causes of action against New Life for, among other claims, breach of the express indemnification in paragraph 4 of the Liability Release and for declaratory relief. The Foodbank alleged that Rodgers' "allegations in the underlying action demonstrate his accident occurred during the acquisition of food on the Foodbank's premises as part of the distribution of donated food, giving rise to the terms of the indemnification clause." The Foodbank alleged that its damages "would include the cost incurred by the Foodbank in defending itself in the underlying litigation."

On November 6, 2009 New Life filed a motion for summary adjudication on all four causes of action in the Foodbank's cross-complaint, and for summary judgment. On

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[3] Rodgers did not name New Life as a defendant but did name 25 Doe defendants.

[4] New Life's insurer had previously rejected a January 8, 2009 tender by the Foodbank, and rejected it again after the Foodbank re-tendered the claim on February 24, 2009.

the Foodbank's cause of action for breach of express indemnification, New Life argued that the express indemnity of paragraph 4 of the Liability Release did not apply to "any injuries incurred by [New Life's] volunteers while on the premises of the [Foodbank]," nor to "liabilities incurred as a result of the [Foodbank]'s negligence in not maintaining its facilities in a reasonably safe condition." New Life contended that although the indemnification agreement would apply if Rodgers had been "injured while storing food at the church, while distributing the food to the needy, or by consuming food spoiled as a result of the improper storage of the food by [New Life]," the indemnification agreement did not apply to Rodgers' claim "that he was injured because of the [Foodbank]'s failure to maintain its facilities in a safe condition." New Life argued that the Foodbank's negligence was "clear and undisputed" and "active," and that the indemnification provision did not cover the Foodbank's active negligence.

The Foodbank filed a motion for summary adjudication on its third cause of action for declaratory relief and fourth cause of action for express indemnity, asking for an order requiring New Life to indemnify and defend Foodbank.[5] On its cause of action for breach of express indemnification, the Foodbank argued "New Life's defense and indemnity obligation" covered "situations where New Life volunteers are injured in the course and scope of their volunteer activities at Foodbank." The Foodbank further argued that "the terms of the agreement call for New Life to defend and indemnify [the]

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[5] The Foodbank states on appeal that it sought summary adjudication "of the duty element of its fourth cause of action for express indemnity, seeking a determination that New Life had a contractual duty to defend Foodbank." This suggests that the Foodbank was moving for summary adjudication as to "one or more issues of duty" (Code Civ. Proc., § 437c, subd. (f)(1)). The Foodbank's notice of motion, however, stated that the Foodbank was moving for summary adjudication on the entirety of its third and fourth causes of action and was requesting "an order that New Life immediately defend and indemnify Foodbank" and "an award of costs incurred in defending its case against plaintiff to date . . . ." This suggests that the Foodbank was moving for summary adjudication as to "one or more causes of action" (*ibid*.). New Life does not argue on appeal that the trial court erred by summarily adjudicating less than an entire cause of action. (See *Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1312; *DeCastro West Chodorow & Burns, Inc. v. Superior Court* (1996) 47 Cal.App.4th 410, 423.)

Foodbank for 'any action' of New Life 'in connection' with the storage, use, or distribution of food," and because "New Life cannot store, use, or distribute food without first acquiring it, the acquisition of food is *related* to its storage, use, and distribution." The Foodbank also pointed out that paragraph 4 included a provision imposing on New Life a broad duty to defend and as well as a broad duty to indemnify.

The trial court granted the Foodbank's motion for summary adjudication on the issue of New Life's express indemnity duty, and denied New Life's motion. The trial court stated that it was "of the view that the express indemnity agreement does cover Mr. Rodgers' injury or damages and at the very least, at a minimum, would trigger the duty to defend . . . ."

In early 2010 New Life entered into a settlement agreement with Rodgers, pursuant to which Rodgers agreed to file a request for dismissal of his complaint against the Foodbank. Although the record on appeal contains no evidence of this settlement, the record does include a notice of settlement of the entire case filed by Rodgers on or about February 9, 2010. The parties also appear to agree that the Foodbank did not participate in the settlement between Rodgers and New Life, and that the notice of settlement mistakenly advised the trial court that the parties had settled the entire action, when in fact the Foodbank had not settled its cross-complaint against New Life. On February 11, 2010 the trial court, in reliance on this incorrect notice of settlement, vacated the trial date and set an order to show cause re dismissal of the entire action.[6] The Foodbank then filed a motion to set a trial date on its cross-complaint, which the trial court granted on August 16, 2010.

There was only one witness at the court trial: Laura Warner, the accounting manager at the law firm representing the Foodbank. Warner authenticated the billing records reflecting the attorneys' fees and costs the Foodbank had incurred in defending

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6 New Life states in its opening brief that the parties advised the trial court at the February 11, 2010 final status conference that the complaint had been settled, but the parties have not included the transcript of the February 11, 2010 hearing, if there is one, in the record on appeal.

against Rodgers' complaint. The trial court overruled New Life's hearsay objections to the bills, and the parties submitted trial and closing briefs. The trial court found in favor of the Foodbank and entered judgment against New Life in the amount of $62,055.19.

DISCUSSION

We review the trial court's interpretation of an indemnity agreement de novo. (*McCrary Construction Co. v. Metal Deck Specialists, Inc.* (2005) 133 Cal.App.4th 1528, 1535; see *Tana v. Professionals Prototype I Ins. Co.* (1996) 47 Cal.App.4th 1612, 1616 ["Because the issue is one of law and exclusively dependent on an interpretation of writings, on appeal from an order granting summary judgment, we exercise de novo review."].) Where, as here, the parties did not submit any admissible extrinsic evidence regarding the meaning of the indemnity provision and the facts are undisputed, "we review the trial court's application of law independently." (*McCrary Construction Co.*, *supra*, at p. 1535; see *Rooz v. Kimmel* (1997) 55 Cal.App.4th 573, 585 ["Because the trial court construed the indemnity and hold harmless provision without the aid of conflicting extrinsic evidence, the interpretation of that agreement is a question of law for this court."].) In the insurance context, "'[w]hen determining whether a particular policy provides a potential for coverage and a duty to defend, we are guided by the principle that interpretation of an insurance policy is a question of law.'" (*Food Pro Internat., Inc. v. Farmers Ins. Exchange* (2008) 169 Cal.App.4th 976, 984-985.)

"Parties to a contract . . . may define therein their duties toward one another in the event of a third party claim against one or both arising out of their relationship. Terms of this kind may require one party to *indemnify* the other, under specified circumstances, for moneys paid or expenses incurred by the latter as a result of such claims. [Citation.] They may also assign one party, pursuant to the contract's language, responsibility for the other's *legal defense* when a third party claim is made against the latter." (*Crawford v.*

Weather Shield Mfg., Inc. (2008) 44 Cal.4th 541, 551, fn. omitted (*Crawford*).)[7] Because "the parties have great freedom to allocate such responsibilities as they see fit[] . . . they may agree that the promisor's indemnity and/or defense obligation will apply only if the promisor was negligent, or, conversely, even if the promisor was not negligent." (*Ibid.*) Courts interpret indemnity agreements using the same rules applicable to contracts in general, except that if a party to a noninsurance indemnity agreement seeks indemnity for its active negligence or regardless of the indemnitor's fault, the indemnity agreement's "language on the point must be particularly clear and explicit, and will be construed strictly against the indemnitee." (*Id.* at p. 552.)

The Supreme Court in *Crawford* also explained that Civil Code section 2778 (section 2778) "sets forth general rules for the interpretation of indemnity contracts, 'unless a contrary intention appears.' If not forbidden by other, more specific, statutes, the obligations set forth in section 2778 thus are deemed included in every indemnity agreement unless the parties indicate otherwise. Several subdivisions of this statute touch specifically on the indemnitor's obligations with respect to the indemnitee's defense against third party claims. [¶] In this regard, the statute first provides that a promise of *indemnity* against claims, demands, or liability 'embraces the *costs of defense* against such claims, demands, or liability' insofar as such costs are incurred reasonably and in good faith. (§ 2778, subd. 3, italics added.) Second, the section specifies that the indemnitor 'is bound, on request of the [indemnitee], *to defend* actions or proceedings

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[7] "Indemnity may be defined as the obligation resting on one party to make good a loss or damage another party has incurred." (*Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628.) "An indemnitor is the party who is obligated to pay another. An indemnitee is the party who is entitled to receive the payment from the indemnitor." (*Maryland Casualty Co. v. Bailey & Sons, Inc.* (1995) 35 Cal.App.4th 856, 864; see Riecken, *The Duty to Defend under Non-insurance Indemnity Agreements: Crawford v. Weather Shield Manufacturing, Inc. and its Troubling Consequences for Design Professionals*, 50 Santa Clara L.Rev. 825, 828 ["The party providing protection is the 'indemnitor'; the protected party is the 'indemnitee'; and the act of providing protection is 'indemnification.'"].) "Indemnity generally refers to third party claims." (*Zalkind v. Ceradyne, Inc.* (2011) 194 Cal.App.4th 1010, 1024.)

brought against the [indemnitee] in respect to the matters embraced by the indemnity,' though the indemnitee may choose to conduct the defense. [Citation.]" (*Crawford*, *supra*, 44 Cal.4th at p. 553.)

"A duty to defend another, stated in that way, is thus different from a duty expressed simply as an obligation to pay another, after the fact, for defense costs the other has incurred in defending itself." (*Crawford*, *supra*, 44 Cal.4th at p. 554.) Under section 2778, "unless the parties' agreement expressly provides otherwise, a contractual indemnitor has the obligation, upon proper tender by the indemnitee, to accept and assume the indemnitee's active defense against claims encompassed by the indemnity provision. Where the indemnitor has breached this obligation, an indemnitee who was thereby forced, against its wishes, to defend itself is entitled to reimbursement of the costs of doing so." (*Crawford*, *supra*, 44 Cal.4th at p. 555; see *Searles Valley Minerals Operations Inc. v. Ralph M. Parsons Service Co.* (2011) 191 Cal.App.4th 1394, 1401.)

Thus, "subdivision 4 of section 2778, by specifying an indemnitor's duty 'to defend' the indemnitee upon the latter's request, places in every indemnity contract, unless the agreement provides otherwise, a duty to assume the indemnitee's defense, if tendered, against all claims 'embraced by the indemnity.' The indemnitor's failure to assume the duty to defend the indemnitee upon request (§ 2778, subd. 4) may give rise to damages in the form of reimbursement of defense costs the indemnitee was thereby forced to incur. But this duty is nonetheless distinct and separate from the contractual obligation to pay an indemnitee's defense costs, after the fact, as part of any indemnity owed under the agreement. (*Id*., subd. 3.) [¶] Implicit in this understanding of the duty to defend an indemnitee against all claims 'embraced by the indemnity,' as specified in subdivision 4 of section 2778, is that the duty arises immediately upon a proper tender of defense by the indemnitee, and thus before the litigation to be defended has determined whether indemnity is actually owed. This duty, as described in the statute, therefore cannot depend on the outcome of that litigation. It follows that, under subdivision 4 of section 2778, claims 'embraced by the indemnity,' as to which the duty to defend is owed, include those which, at the time of tender, *allege* facts that would give

rise to a duty of indemnity. Unless the indemnity agreement states otherwise, the statutorily described duty 'to defend' the indemnitee upon tender of the defense thus extends to all such claims." (*Crawford*, *supra*, 44 Cal.4th at pp. 557-558, fn. omitted; see *UDC-Universal Development, L.P. v. CH2M Hill* (2010) 181 Cal.App.4th 10, 20 (*UDC*).)

The duty to indemnify for defense costs is an obligation to reimburse another, after the fact, for defense costs the other has incurred in defending itself. (*Crawford*, *supra*, 44 Cal.4th at pp. 554-555.) This is because "[o]ne can only indemnify against 'claims for damages' that have been resolved against the indemnitee, i.e., those as to which the indemnitee has actually sustained liability or paid damages." (*Id.* at p. 559.) In contrast, the duty to defend "arises as soon as such claims are made against the promisee, and may continue until they have been resolved," and does "not require a final determination of the issues, including the issue of [the indemnitor's] negligence, before [the indemnitor is] required to mount and finance a defense" on behalf of the indemnitee. (*Id.* at pp. 553, 559.)

In *Crawford*, a general contractor sued a subcontractor for breach of express indemnity and the duty to defend a claim brought by a group of homeowners against the contractor and various subcontractors. (*Crawford*, *supra*, 44 Cal.4th at pp. 548, 549.) In the contract between the general contractor and the subcontractor, the subcontractor "promised (1) 'to indemnify and save [the general contractor] harmless against all claims for damages . . . loss . . . and/or theft . . . growing out of the execution of [the subcontractor's] work,' *and* (2) 'at [its] own expense to *defend any suit or action* brought against [the general contractor] *founded upon* the claim of such damage[,] . . . loss, . . . or theft." (*Id.* at pp. 547-548.) The parties agreed that the contract did not provide for indemnification unless the indemnitor subcontractor was negligent, and the jury found that the subcontractor was not negligent. (*Id.* at pp. 547, 559-560.) The Supreme Court held that the subcontractor still had a duty to defend the general contractor. (*Id.* at p. 547.) The court held that the subcontract "not only failed to limit or exclude [the subcontractor's] duty 'to defend' [the general contractor], as otherwise provided by subdivision 4 of section 2778, it confirmed this duty. In language similar to that of the

statute, the subcontract explicitly obligated [the subcontractor] to both *indemnify* [the general contractor] against certain claims, and 'at [its] own expense *to defend* [the general contractor] against 'any suit or action . . . founded upon' such claims. . . . The 'duty to defend' expressly set forth in [the] subcontract thus clearly contemplated a duty that arose when such a claim was made, and was not dependent on whether the very litigation to be defended later established [the subcontractor's] obligation to pay indemnity." (*Crawford*, *supra*, at p. 558, fn. omitted.) Therefore, the court held that under the language of the contract, the subcontractor had a duty to indemnify the general contractor "regardless of whether it was ultimately determined that [the subcontractor] was actually negligent," and indeed even though the jury specifically found that the subcontractor was not negligent. (*Id.* at p. 568.)

In *UDC*, the general contractor sued a subcontractor for, among other things, breach of express contractual indemnity for claims also brought by a group of homeowners. (*UDC, supra*, 181 Cal.App.4th at p. 14.) The contract provided that the subcontractor "'shall indemnify and hold'" the general contractor "free and harmless from and against any and all claims, liens, demands, damages, injuries, liabilities, losses and expenses of any kind, including reasonable fees of attorneys, accountants, appraisers and expert witnesses, to the extent they arise out of or are in any way connected with any negligent act or omission by" the general contractor, "whether such claims, liens, demands, damages, losses or expenses are based upon a contract, or for personal injury, death or property damage or upon any other legal or equitable theory whatsoever. *[Subcontractor] agrees, at his own expense and upon written request by Developer or Owner of the Subject Property, to defend any suit, action or demand brought against Developer or Owner on any claim or demand covered herein.*"[8] (*Id.* at pp. 18-19.) The court held that under *Crawford*, the subcontractor had a duty to defend, even though the jury found that the subcontractor was not negligent. (*Id.* at pp. 15, 20-21.) The court

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[8] The indemnification provision excluded liability arising from the contractor's "gross negligence or willful misconduct." (*UDC, supra*, 181 Cal.App.4th at p. 19.)

explained that the "indemnity provision does not state that there must be an underlying claim of negligence specifically against [the subcontractor] in order to trigger [the subcontractor's] defense obligation. It calls for indemnification when claims against [the general contractor] 'arise out of or are in any way connected with' a negligent act or omission by [the subcontractor]. The duty to defend applied to *any* 'suit, action or demand brought against [the general contractor] on any claim or demand covered herein.'" (*Id.* at p. 20.)

The language in the contract between the Foodbank and New Life is different than the language in *Crawford* and *UDC*. On the one hand, the contracts in *Crawford* and *UDC* had two separate clauses, one describing the duty to indemnify and another describing the duty to defend, contractually emphasizing that the two duties were different. Both the *Crawford* and *UDC* courts also specifically noted that the language of the indemnity provision and the language of the separate defense provision were different. (See *Crawford*, *supra*, 44 Cal.4th at pp. 558-559; *UDC*, *supra*, 181 Cal.App.4th at pp. 20-21; but see *Searles Valley Minerals Operations Inc. v. Ralph M. Parsons Service Co.*, *supra*, 191 Cal.App.4th at p. 1400 [indemnitor agreed in one sentence to "defend, indemnify and save" indemnitee from claims arising out of indemnitor's negligence.) In contrast, Paragraph 4 of the Liability Release has only one clause that sets forth New Life's indemnification and defense obligations together in one sentence: New Life agreed to "indemnify, defend and hold Foodbank free and harmless from and against all and any liabilities . . . in connection with [New Life's] storage and/or use, including distribution of donated food."

On the other hand, the scope of the contractual duties to indemnify and defend here are much broader than those in *Crawford* and *UDC*. In *Crawford*, the contract provided for the defense of "'any suit or action brought against [the indemnitee] founded upon'" claims for damages, loss, or theft "'growing out of the execution of [the indemnitor's] work'" on the project (which the parties agreed meant the indemnitor's negligent work). (*Crawford*, *supra*, 44 Cal.4th at pp. 547-548, 559-560, italics omitted.) In *UDC*, the contract provided for the defense of "any suit, action[, or claim] or demand"

that might "arise out of or are in any way connected with any negligent act or omission by" the indemnitor. (*UDC, supra*, 44 Cal.4th at p. 19.) The contract here provides for the defense of "all and any liabilities, damages, losses, claims, causes of action, suits at law or in equity or any obligation whatsoever . . . arising out of or attributed to any action of [New Life] in connection with [New Life's] storage and/or use, including distribution of donated food." Paragraph 4 of the Liability Release does not limit New Life's defense obligation to claims arising out of or connected with New Life's negligence. It is much broader, applying to all claims arising out of any action of New Life in connection with New Life's storage or use of the donated food, whether or not the claim involves New Life's negligence and regardless of where the conduct giving rise to the claim occurs. As New Life concedes, "[i]n many ways" the Liability Release "is less restrictive from those utilized in *Crawford* and *UDC* because it does not require a showing of negligence on the part of [New Life]." Even if the claim involves conduct that is not "attributable" to New Life, the duty to defend applies if the claim "arises out of" any action of New Life. And New Life's contractual duty to defend applies to claims "in connection with" New Life's storage or use of the donated food. The language of Paragraph 4 is broad enough to cover Rodgers' claim that he was injured at the Foodbank while volunteering for and gathering items on behalf of New Life.

New Life argues that it did not have a duty to defend the Foodbank against Rodgers' claim because Rodgers' claim did not arise out of nor was attributable to an action by New Life "in connection with" New Life's "storage and/or use, including distribution of donated food." Although New Life believes that "[i]n many respects, the use of the words 'storage and/or use' in this instance, is vague and ambiguous," New Life nonetheless "construes [these] words as meaning only that it would become responsible *after* it had obtained the merchandise from the [Foodbank] warehouse and was actually storing and/or using the merchandise at its facility." The Foodbank argues that "the concept of 'distribution' encompasses the entire range of activities performed by New Life's food ministry volunteers on a weekly basis, including gathering food from Foodbank's warehouse, transporting it back to New Life, storing it, and then making it

available to the needy. Since New Life obviously could not distribute the food without first acquiring it from Foodbank's warehouse, New Life's acquisition of food ('any action') is related to ('in connection with') its distribution of it."

We agree with the Foodbank's interpretation of this language. In order to implicate the duty to defend, the claim need only be "in connection with" New Life's storage, use, or distribution of the donated food. By obtaining the donated food from the Foodbank, New Life was "using" it, and obtaining the food was the first step in "distributing" it. "Distribution" is "the action or process of supplying goods to retailers" or "the action of sharing something out among a number of recipients." (Oxford Dictionaries<http://oxforddictionaries.com; Webster's 3d New Internat. Dict. (2002) p. 660; see *Miller Brewing Co. v. Department of Alcoholic Beverage* Control (1988) 204 Cal.App.3d 5, 15 ["'distribution'" as used in Business and Professions Code section 25600 means "'the process by which commodities get to final consumers, including storing, selling, shipping and advertising'"]; see generally *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121-1122 ["[w]hen attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word"].) Obtaining the food from the Foodbank's warehouse was part of the "action or process" of getting the food from the donors of the food to the recipients of the food. Indeed, part of Gutierrez's responsibilities as supervisor of New Life's food distribution program was to pick up the food and bring it back to the church. And even if obtaining the food was not technically part of New Life's use and distribution of it, obtaining the food was "in connection with" New Life's use and distribution of the food. As the trial court recognized, "the whole reason [Rodgers was] there, is he's in the act of getting things that is part of the storage, use or distribution of donated food," and Rodgers "got injured doing something on behalf of New Life in connection with the storage, use or distribution of the merchandise."

New Life argues that *Crawford* and *UDC* are distinguishable because in both cases "the underlying lawsuit alleged damages arising from conduct that could be attributed to the negligence of each indemnitor," whereas Rodgers' complaint "asserts damages,

claims and causes of action arising from the negligence of the [Foodbank] in the maintenance of its premises," and "New Life was never named as a defendant in the underlying lawsuit." The *UDC* court rejected this very argument. The fact that Rodgers' one-paragraph allegation about how he fell accused "defendants" of negligence but did not mention New Life by name does not determine the scope of New Life's duty to defend the Foodbank under paragraph 4 of the Liability Release. "An indemnitee should not have to rely on the plaintiff to name a particular [indemnitor] in order to obtain a promised defense by the one the indemnitee believes is responsible for the plaintiff's damages." (*UDC, supra*, 181 Cal.App.4th at p. 21; see *Davidson v. Welch* (1969) 270 Cal.App.2d 220, 234, 235 ["bare allegations of the claimant's complaint do not control" scope of duty to defend, which exists when the complaint gives rise to "the potential for liability"].) As the Supreme Court has stated in the context of an insurer's duty to defend, "we do not, in analyzing the insurer's duty to defend, look merely to the language of the complaint filed against the insured. 'Defendant cannot construct a formal fortress of the third party's pleadings and retreat behind its walls. . . . An insurer . . . bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy.' . . . (See also *Davidson*[, *supra*, at pp.] 233-234 . . . .)" (*Paramount Properties Co. v. Transamerica Title Ins. Co.* (1970) 1 Cal.3d 562, 570-571, italics omitted, quoting *Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 276-277; see *Buss v. Superior Court* (1997) 16 Cal.4th 35, 46 ["the insurer's duty to defend runs to claims that are merely potentially covered, in light of facts alleged or otherwise disclosed"]; *Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 198 ["If, under the *facts* alleged, the complaint could be fairly amended to state a cause of action alleging a covered liability, there will be a duty to defend."].)[9]

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9 Most of the cases stating the rule that the duty to defend is not determined exclusively from the words of the complaint are insurance cases. The Supreme Court's citation in *Paramount Properties* to *Davidson*, however, indicates that this rule also applies in noninsurance cases.

Rodgers' complaint did not name New Life, but it fairly and easily could have been amended to name New Life as one of the Doe defendants. In addition, New Life had knowledge of facts that triggered its duty to defend. (See *Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal.4th 643, 654 [duty to defend "exists where extrinsic facts known to the insurer suggest that the claim may be covered"].) New Life knew that Rodgers was injured while volunteering for New Life, under the supervision of New Life employee Gutierrez, following Gutierrez's instructions, lifting items Gutierrez knew were too heavy for him, and right in the middle of doing something that Gutierrez had told him to do. Rodgers' failure to name or include any allegations about New Life did not defeat the Foodbank's right to a defense from New Life.

New Life also suggests that *Crawford* and *UDC* are limited to cases involving contractors and subcontractors. Nothing in either opinion, however, states or implies that either decision's discussion of the duty to defend is limited to contractor-subcontractor indemnifications. The *Crawford* court "based its decision upon a statute [section 2778] that applies to every indemnity agreement, and it did not limit its opinion to the design and construction fields." (Riecken, *supra*, 50 Santa Clara L.Rev. at p. 843, fn. omitted.)

Finally, New Life argues that "an indemnitee, seeking to obtain indemnity for his or her active negligence, must include in the indemnity agreement — in language that is clear and explicit — a provision advising the indemnitor that it is responsible for providing indemnity even for claims arising from the indemnitee's own tortious conduct." It is true that "if one seeks, in a noninsurance agreement, to be indemnified for his or her own active negligence, or regardless of the indemnitor's fault—protections beyond those afforded by the doctrines of implied or equitable indemnity—language on the point must be particularly clear and explicit, and will be construed strictly against the indemnitee." (*Crawford*, *supra*, 44 Cal.4th at pp. 552, 562 ["if one seeks contractual indemnity protection for his or her own active negligence, the language providing such protection must be particularly clear and explicit"].) But this rule applies to indemnification provisions, not defense provisions. Indeed, the Supreme Court in *Crawford* distinguished a prior case stating the rule requiring clear and explicit language

for an indemnification agreement to cover the indemnitee's active negligence, *Goldman v. Ecco-Phoenix Electric Corp.* (1964) 62 Cal.2d 40, on the ground that *Goldman* involved an indemnity clause not a defense clause. (*Crawford*, *supra*, at p. 562.)

New Life has not cited, nor have we found, any cases applying the active-passive negligence classification and corresponding interpretive rule for indemnity agreements to duty to defend agreements. Neither would we expect any such cases: The active-passive negligence distinction is inapplicable to the duty to defend because whether the indemnitee's negligence is active or passive is not known until the end of the case, when the judge or jury reaches a decision and determines which party is negligent, and often in what percentages. (See *Crawford*, *supra*, 44 Cal.4th at p. 559 ["One can only indemnify against 'claims for damages' that have been resolved against the indemnitee, i.e., those as to which the indemnitee has actually sustained liability or paid damages."]; *Total Call Internat., Inc. v. Peerless Ins. Co.* (2010) 181 Cal.App.4th 161, 167 ["'the duty to indemnify . . . arises only when the insured's underlying liability is established'"].) The duty to defend, however, does not depend on the outcome of the litigation, and "'must be assessed at the very outset of a case.'" (*Total Call*, *supra*, at p. 167; see *Crawford*, *supra*, at p. 558; *UDC*, *supra*, 181 Cal.App.4th at pp. 21-22 ["a duty to defend arises out of an indemnity obligation as soon as the litigation commences and regardless of whether the indemnitor is ultimately found negligent"].)

New Life's duty to defend arose when the Foodbank tendered the Rodgers action to New Life pursuant to paragraph 4 of the Liability Release. The trial court properly granted the Foodbank's motion for summary adjudication on the issue of New Life's duty to defend and entered judgment in favor of the Foodbank for the costs of its defense.

DISPOSITION

The judgment is affirmed. The Foodbank is to recover its costs on appeal.

SEGAL, J.*

We concur:

PERLUSS, P. J.

WOODS, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.