

### **Insurer May Recover Via Indemnity from an Additional Insured** **Credit to: McCormick Barstow, Fresno, CA**

*Valley Crest Landscape Development, Inc. v. Mission Pools of Escondido, Inc.* (4th Dist. Ct. App. 2015) 2015 W.L. 4052411, \_\_\_ Cal. App. 4th \_\_\_, Case No. G049060  
Jeffrey Epps was severely injured when, while intoxicated, he dove into a swimming pool at the St. Regis Resort. He and his wife sued the owner (CPH), the general contractor for exterior improvements at the resort (Valley Crest) and the subcontractor who built the pool (Mission Pools). Valley Crest tendered its defense to Mission Pools under an indemnity provision in the subcontract but Mission Pools never responded. Valley Crest then filed a cross-complaint against Mission Pools for express indemnity. During discovery, the Epps set forth their claims related to the alleged defects which included allegations directed at Mission Pools that the vertical tile depth markers were partially submerged making them illegible, and the use of French gray plaster in the pool making it difficult to determine depth.

Valley Crest and Mission Pools made motions for summary judgment based on a statute of limitations defense. Mission Pools also asserted it did not use French gray plaster and that the vertical line markers did not contribute to the injuries. The court granted Mission Pools' motion as to the first amended complaint, but denied Valley Crest's motion as it had failed to object to the evidence that French gray plaster was used. The Epps subsequently settled with all defendants. CPH paid \$4.5 million. The Epps' claims against Valley Crest and Mission Pools, as well as CPH's express indemnity claim against Valley Crest, were resolved by Valley Crest's payment of \$20,000 to the Epps and \$30,000 to CPH, and by Mission Pools payment of \$130,000 to the Epps and \$70,000 to CPH.

National Union intervened in and became a cross-complainant in the cross-complaint of Valley Crest against Mission Pools. The first amended cross-complaint alleged express indemnity, declaratory relief and contribution on behalf of Valley Crest and equitable subrogation, declaratory relief and contribution on behalf of National Union. Trial of this action was conducted in two phases. First, as to National Union's equitable subrogation claim, the court found National Union was entitled to recover amounts it had expended in excess of a self-insured retention to defend and indemnify Valley Crest and CPH under an additional insured endorsement. The court further held that Mission Pools had forfeited its right to seek an allocation between fees and costs associated with claims related to the work of Mission Pools and those associated with unrelated claims. In the second phase, the court tried Valley Crest's express indemnity claim without a jury, finding the claim was essentially one for specific performance of the indemnity obligation and therefore equitable. The trial court determined that Valley Crest was entitled to recover the amount it had paid under its self-insured retention from Mission Pools pursuant to the indemnity agreement. Mission Pools appealed.

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**President's Message**

From rain....and more rain in July, to record high temperatures, and fires, all over California, Oregon, Washington, Idaho, Montana, Nevada and Colorado. 95 fires in these states have destroyed hundreds of homes, and burned more than 1.1 million acres. For the first time since 2006, active duty military personnel will help battle the wild-fires in these seven western states. I am thankful for the firefighters and cannot even imagine what it is like battling fires in the 100+ temperatures, not to mention the heat from the fires.



Kim Hickey  
CAIIA President

I do not even want to think about the water we are using to battle these fires. But wait...there is rain coming this winter. Rumor has it we might see the Godzilla El Nino... This is not the first time we have been told that El Nino is coming our way but this summer has felt a bit different. The humidity has been higher than normal (better for our skin!) and we saw more than just a normal summer rain in July. I am hopeful that we will see the rain to replenish our water reserves, lakes, and rivers, along with snow in the mountains to feed our water supply next spring and summer. With all of the efforts we are making to conserve water, our reserves should last longer in the future.

On August 11<sup>th</sup> and 12<sup>th</sup>, 2015, the CAIIA had a booth at the Claims Conference of Northern California. We sponsored Ice Cream on August 11<sup>th</sup> and it was enjoyed by all that attended. I would like to thank Paul Camacho, Steve Washington, Scott Washington, Phil Barrett and Rick Kern for spending time at the booth, handing out CAIIA information, and making luggage tags. I would also like to thank the CCNC committee for the perfect location of our booth space just outside of the Exhibitor Hall. We are able to visit with everyone coming in and going out of the Hall and classes.

In this Status Report you will find the Registration Form for the Fall/Annual CAIIA Convention in South Lake Tahoe. We are holding it at the Inn By The Lake. Thursday will include a reception/Taco Bar at the Events Center at the Inn. Friday will include a continuing education class, lunch, business meeting, and then the Gala Dinner Dance. There will be a spouse/guest event on Friday. I have my flight reservation and am looking forward to this event.

For now, enjoy the rest of the summer...lazy weekend days by the pool or the beach...short get away weekends...cruises....trips abroad...

Thank you for your interest in the CAIIA.

Kimberley Hickey, President - CAIIA 2014-2015

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## ***From the DOI: 6 sentenced in Verizon Wireless Scam***

Six individuals involved in a mobile phone insurance scam were sentenced on felony fraud charges after filing more than 1,300 claims for stolen and damaged phones totaling more than half a million dollars. The convicted scammers, including some Verizon Wireless employees, were arrested by Department of Insurance detectives and Los Angeles Police Department officers in May 2013.

"Insurance fraud is an expensive drain on the state's economy, totaling billions of dollars annually. The cost of these scams is passed along to consumers through higher insurance rates," said Insurance Commissioner Dave Jones. "Thanks to the superior work of department detectives and aggressive prosecution by the district attorney, we were able to shut down their criminal enterprise."

Through the course of the investigation, detectives discovered at least three Verizon employees accessed consumer account information to identify customers with high-end phones and file insurance claims for what they claimed were damaged or stolen phones. The replacement phones were shipped to the conspirators' homes. Three additional co-conspirators had phones sent to their homes and hotels. Detectives identified Louis Lovett, 31, of Sacramento, as the mastermind behind the scheme. The fraudulent claims totaled approximately \$636,000. According to detectives, there is no indication that consumer identities or personal account information was stolen or used by suspects.

"As the department noted, we have no indication that any personal account information was stolen or any customers harmed. We take the protection and privacy of our customers' accounts very seriously and congratulate the insurance commissioner and the district attorney for their handling of this case," a Verizon spokesman said.

Court ordered restitution of \$636,265 was ordered to be paid to Asurion, the mobile protection insurance company that was defrauded.

### **Media Notes:**

As the mastermind behind the crime, Lovett was ordered to repay the entire fraud loss amount, but all individuals are held responsible for ensuring the restitution is paid. In effect, the remaining five suspects were ordered restitution based on the agreed upon amount of their apportioned responsibility.

This case was prosecuted by the Sacramento District Attorney's Office. All six individuals pleaded no contest to multiple felony counts of insurance fraud. The sentencing information for each is as follows:

**Louis Lovett**, 31; sentenced on 07/17/15 to 10 years in County Jail (6 years in custody and 4 years probation); ordered to pay \$636,265 in restitution.

**Aleta Pinkney**, 33; sentenced on 07/17/15 to 3 years in County Jail and 18 months probation; ordered to pay \$102,000 in restitution.

**Nicholas Brown**, 27; sentenced on 05/29/15 to 2 years in County Jail; ordered to pay \$217,000 in restitution. **Antonio Miller**, 26; sentenced on 05/29/15 to 2 years in County Jail; ordered to pay \$164,000 in restitution.

**Anthony Stanford**, 26; sentenced on 07/17/15 to 364 days in County Jail and 5 years formal probation; ordered to pay \$57,000 in restitution.

**Adi Qalivutu**, 23; sentenced on 07/15/15 to 364 days in County Jail and 5 years formal probation; ordered to pay \$57,000 in restitution.

***According to detectives, there is no indication that consumer identities or personal account information was stolen or used by suspects.***

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## THE APPELLATE COURT'S RULING

The appellate court first rejected Mission Pools' contention that the claim for express indemnity was time barred by Code of Civ. Proc. §337.1(a) [dealing with construction defect claims], finding that this code section does not apply to contractual indemnity claims which are based on contract and accrue when the indemnitor pays the money for which indemnity is sought. Since the claim accrued at the earliest when Valley Crest tendered its defense, and the cross-complaint was filed two months later, the claim was not time barred.

Next, the appellate court dealt with Mission Pools' contention that National Union was not entitled to equitable subrogation since its equitable position was inferior to that of Mission Pools. Citing the case of *Interstate Fire & Casualty Ins. Co. v. Cleveland Wrecking Co.* (2010) 182 Cal. App. 4th 23, the appellate court discussed various factors to be considered in "balancing the equities" between the parties. First, the court noted that National Union had not caused Jeffrey Epp's injuries and, while Mission Pools was alleged to have contributed to his injuries, summary judgment had been ordered in Mission Pools' favor on this issue. Second, Mission Pools had specifically agreed to indemnify Valley Crest against the type of loss which occurred while National Union had simply insured against loss in general. Third, although National Union accepted premiums to insure the risk of loss, Mission Pools also accepted consideration in return for performing its obligations under the subcontract. The appellate court concluded that, based on these factors alone, the equities were fairly even. However, Mission Pools had failed to fulfill its obligations under the subcontract by ignoring the tender while National Union did everything it was obligated to do under its policy. This, the appellate court held, tipped the equities in favor of National Union. In so holding, it distinguished and declined to follow *Patent Scaffolding Co. v. William Simpson Constr. Co.* (1967) 256 Cal. App. 2d 506.

Finally, the appellate court addressed the trial court's decision to deny Mission Pools a jury trial on the express indemnity claim on the ground that the claim was essentially one for specific performance. In reversing the trial court's decision on this claim, the appellate court noted that Valley Crest was not seeking specific performance but instead was seeking money damages in the form of amounts it had expended in defending and settling the Epps' claim. Thus, this claim was legal and not equitable. In addition, there was no allegation of an inadequate legal remedy, a prerequisite to a claim for specific performance. Therefore, the appellate court reversed the judgment in favor of Valley Crest on the express indemnity claim and remanded for further proceedings.

## EFFECTS OF THE RULING

This case offers strong support for insurers seeking subrogation from parties owing contractual indemnity to the insured where the insurer has fulfilled its obligations under the policy while the party owing indemnity has not. Here, even though the party with the indemnity obligation was effectively absolved of liability for the underlying loss by virtue of a summary judgment motion, the appellate court noted that it was obligated to defend at least until the motion was granted and its failure to so do resulted in the equities tipping in favor of the insurer. Thus, the insurer was able to recover the entirety of amounts expended for defense and indemnity on behalf of its insured and its additional insured. The appellate court also disagreed with the holding in *Patent Scaffolding* to the effect that an insurer's act of fulfilling its obligations does not create in the insurer superior equities to those of the party owing contractual indemnity. Instead, the court agreed with the reasoning of the court in *Interstate Fire* to the effect that subrogation should be permitted for the insurer that fulfills its obligations, even if this results in a windfall to the insurer.

## ***Tidbits from Cal– Osha***

### **Pilots' families say Cal Fire owes them death benefits**

For nearly a dozen years, top officials at the California Department of Forestry and Fire Protection knowingly withheld death benefits from the families of 14 contracted firefighter pilots killed in the line of duty, according to a claim that seeks more than \$4 million plus interest for the survivors .

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For nearly a dozen years, top officials at the California Department of Forestry and Fire Protection knowingly withheld death benefits from the families of 14 contracted firefighter pilots killed in the line of duty, according to a claim that seeks more than \$4 million plus interest for the survivors.

### **California issues pose challenge for small firms**

Both Santa Fe Rubber Products Inc., in Santa Fe Springs, and Vip Rubber Co Inc., in La Habra, are keenly tuned into issues that affect small manufacturers. Both singled out workers compensation costs as one of the top hurdles for small firms in California.

William Krames, Santa Fe owner, president and CEO, said he used to be upset when paying \$60,000 in annual premiums. Last year it was \$194,000 for the 50-person company.

“California is the most business unfriendly state there is by a lot of definitions,” Krames said. “I thought once about moving the business, but when they wanted \$1.9 million to rig it out and re-establish it, I decided it was an emotional decision that I probably didn’t want to make.”

Howard Vipperman, president of Vip Rubber, said his firm has been especially unlucky with regards to workers comp and other issues. He said one employee that had been laid off and then sued the firm for unauthorized discharge. “What you end up doing in management is, if it’s going to cost \$20,000 to defend, then you offer them \$10,000 to go way, and usually they do that,” he said.

In other case about five years ago, there was an accident at the plant where a worker was injured. When Cal-OSHA came out to investigate, the inspector couldn’t find anything wrong with the machine. The firm instead was fined \$5,000 because it didn’t report the incident until the next day, rather than within the eight-hour limit. “Then the guy walks in, there was a guy without a seatbelt on a fork lift,” Vipperman said. “That was \$2,500. ... Our premiums are through the roof. They’re double from what they were three or four years ago.”

Krames said the fees and permit Santa Fe has to pay keeps creeping higher, things that similar firms elsewhere don’t have to pay. For example, he said a rubber company similar to his would pay just \$34,000 in annual workers comp premiums in Alabama.

“So when I go up against a company that is not offering medical—which is \$29,000 a month now—or less workers comp premiums, those are the things that put you at a tremendous competitive disadvantage,” he said.

The Santa Fe Rubber owner added it’s often the same clinics and attorneys representing workers that are filing workers comp claims not long after being laid off. “You know they’re bogus,” Krames said. “We put in a camera system, and we’ve really gotten them down. We had one the insurance company refused to settle on. It was a claim of a back injury. We went back to the day he said he had the injury, and he never had it. We provided the film, so we’re beginning to counter some of those things.”

But Krames doesn’t want to give the impression that small rubber firms can’t succeed in the state. “We’ve demonstrated that,” he said. “You just have to be a little more clever and a little more insightful in understanding what your costs are and how they relate, and try to develop a capability that sets you apart from the masses.”

**Cumis Counsel– Right to Recovery of Expenses  
Credit to Haight, Brown and Bonesteel, Los Angeles, CA**

The California Supreme Court held in *Hartford Casualty Insurance Company v. J.R. Marketing, L.L.C. (Squire Sanders)* (8/10/2015 - #S211645) that if *Cumis* counsel, operating under a court order which such counsel drafted and which expressly provided that the insurer would be able to recover excessive fees, sought and received fee payments from the insurer that were fraudulent or otherwise manifestly and objectively useless and wasteful when incurred, *Cumis* counsel have been unjustly enriched at the insurer's expense and the insurer will be permitted under such limited circumstances to seek reimbursement directly from *Cumis* counsel.

Certain Hartford insureds who had been issued commercial general liability policies were sued in multiple proceedings for a variety of claims, including unfair competition, defamation and intentional misrepresentation. Hartford disclaimed a duty to defend or to indemnify the defendants on the grounds that the acts complained of occurred prior to Hartford's policy, and that some of the defendants were not Hartford insureds. A coverage action was filed by some of the insureds against Hartford; they were represented by the Squire Sanders law firm. Although Hartford subsequently agreed to defend several of the defendants subject to a reservation of rights, it declined to pay defense expenses incurred prior to the date of such agreement. Some months later, the trial court entered a summary adjudication order, finding that Hartford had a duty to have defended the liability action on the date it was originally tendered; the order required Hartford to fund the insured's defense with independent counsel (i.e., so-called "*Cumis*" counsel; see *San Diego Federal Credit Union v. Cumis Insurance Society, Inc.* (1984) 162 Cal.App.3d 358). The insureds retained Squire Sanders as their *Cumis* counsel.

The trial court in the coverage action then entered an "enforcement order" (drafted by Squire Sanders) which required that Hartford promptly pay all pending defense invoices and to pay future billings within 30 days. The order found that Hartford had breached its defense obligation and was thus precluded from invoking the "rate provisions" of Civil Code section 2860, although the order recognized that Squire Sanders' fees still had to be "reasonable and necessary." The order concluded by stating that if Hartford sought to challenge *Cumis* counsel's fees and costs as unreasonable and unnecessary, it could do so by seeking reimbursement after the liability action concluded. Both orders were subsequently affirmed by the Court of Appeal.

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**September 7th**

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When the liability action concluded, Hartford brought a cross-complaint in the coverage action (which had been stayed after the *Cumis* order) seeking reimbursement from Squire Sanders of that portion of the \$13.5 million in fees it had been paid to the extent any such services or expenses were “abusive, excessive, unreasonable or unnecessary.” The trial court sustained a demurrer brought by Squire Sanders on the grounds that Hartford could assert no legal or equitable claim directly against *Cumis* counsel based on the terms of the Hartford policy with its insureds and that recognition of such a reimbursement cause of action would be contrary to public policy. Hartford appealed but the Court of Appeal affirmed. The Supreme Court of California granted review on the narrow question it articulated as follows: *May an insurer seek reimbursement directly from counsel when, in satisfaction of its duty to fund its insureds’ defense in a third party action against them, the insurer pays bills submitted by the insureds’ independent counsel for the fees and costs of mounting the defense, and has done so in compliance with a court order expressly preserving the insurer’s post-litigation right to recover ‘unreasonable and unnecessary amounts billed by counsel?’* The Court concluded that given the facts of the case, such a right of reimbursement should run directly against *Cumis* counsel.

Importantly, the Court expressly noted that it was not deciding three material and related questions. In light of the existence of the enforcement order’s express authorization of Hartford to seek reimbursement of excessive fees, the Court felt it need not decide whether absent such an order, an insurer that breaches its defense obligations has *any* right to recover excessive fees paid to *Cumis* counsel. Second, the Court did not need to decide whether, in general, disputes over allegedly excessive *Cumis* fees are more appropriately decided through court action or arbitration. And finally, because the enforcement order expressly provided for resolution of the fee dispute after conclusion of the liability action, the Court would not decide when such disputes generally ought to be decided relative to the underlying litigation.

It was apparent that the fact that Squire Sanders had drafted the very order under which Hartford sought to proceed against it carried great weight with the Court. Indeed, the Court stated that it would express no view as to what rights an insurer that breaches its defense obligations might have to seek reimbursement directly from *Cumis* counsel in situations other than the “unusual one” before it in this case.

Squire Sanders’ arguments that contractual principles and public policy considerations should preclude such a direct action against independent counsel were also rejected by the Court. The Court found that no term of the insurance policy between Hartford and its insureds would be contravened by permitting such a reimbursement claim. The Court also noted that although *Cumis* counsel must retain the “necessary independence to make reasonable choices” in representing clients, such independence is “not inconsistent with an obligation of counsel to justify their fees.”

The Court concluded by noting that the standard for determining Hartford’s entitlement to reimbursement would be the same as if its challenge of *Cumis* counsel’s fees were made contemporaneously, i.e., whether the charges were objectively reasonable at the time they were incurred, under the circumstances then known to counsel; the Court also noted that Hartford bore the burden of proof on the issue of the unreasonableness and lack of necessity of *Cumis* counsel’s fees.

The decision will likely be narrowly construed in connection with future disputes and limited to the unique facts involved. Perhaps the “lesson” to *Cumis* counsel is to refrain from becoming involved in coverage litigation between the insured clients and their insurer lest an order they craft come back to haunt them later! For insurers, the opinion illustrates the importance of preserving the right to challenge *Cumis* fees as unnecessary or unreasonable even where the insurer has been found to have breached some aspect of its defense obligation. However, insurers should use caution in such circumstances where *Cumis* counsel was not involved in the preparation of the order in question.

**CAIIA REGISTRATION FORM**  
**California Association of Independent Insurance Adjusters**  
**ANNUAL FALL CONVENTION– October 1 & 2, 2015**



**3300 Lake Tahoe Boulevard, South Lake Tahoe, CA 96150 Phone: (800) 877-1466**

Reservations must be made by **Tuesday, September 17, 2015** for the CAIIA group rate of \$85.00 - \$105.00, depending on the room type (plus taxes and other fees). Prevailing rates may apply after this date or when the group rooms are sold out, whichever occurs first.  
 Rooms are subject to availability.

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<b>EVENT</b>	<b>COST</b>	<b>#TICKETS</b>	<b>TOTAL PRICE</b>
<b>MEMBER CONVENTION Package (*)</b> (Includes reception/taco bar, breakfast, CE Class/lunch/dinner)	\$150.00	# _____	\$ _____
<b>Non-Member (**) Convention Package</b> (Includes reception, breakfast, CE Class/lunch/dinner)	\$175.00	# _____	\$ _____
<b>Spouse/Guest fee (***)</b> <b>Name</b> _____	\$100.00	# _____	\$ _____
<b>3 Hour CE Class</b> (Includes, breakfast, presentation, lunch)	\$100.00	# _____	\$ _____
<b>President's Gala Dinner/Reception</b>	\$100.00	# _____	\$ _____
<b>Grand Total payable</b>			\$ _____

**SCHEDULED EVENTS**

Please specify which events you and/or your spouse/guest will attend by placing a check mark in the box next to the event.  
 Complete a separate form for each registrant and additional guest.

Please make your checks payable to CAIIA or pay by credit card.  
 Mail Registration Form & payment to:

	<b>You</b>	<b>Spouse/Guest</b>
10/01 – 6:30 P.M. Taco Bar, Inn By The Lake Event Room	[ ]	[ ]
10/02 -- 8:00 A.M. Registration/Breakfast	[ ]	[ ]
10/02 – 9:00 A.M. Seminar	[ ]	[ ]
10/02 – 12:00 P.M. Lunch	[ ]	[ ]
10/02 – 1:30 P.M. Business Meeting	[ ]	[ ]
10/02 – 6:30 P.M. Reception/cocktail Hour	[ ]	[ ]
10/02 – 7:30 P.M. President's Inaugural Dinner	[ ]	[ ]

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(\*) Members only.  
 (\*\*) We welcome the attendance and participation of insurance company and risk management claims personnel and attorneys at the President's Gala Dinner Event, the Educational Seminars, and Luncheon following seminars.  
 (\*\*\*) Spouse/Guest fee includes alternative activity, breakfast and dinner on Friday. (Possible Thunderbird Lodge / Whitell Mansion Tour)



## On the Lighter Side...

### 7 Reasons Not To Match Wits With Children

A little girl was talking to her teacher about whales.

The teacher said it was physically impossible for a whale to swallow a human because even though it was a very large mammal its throat was very small.

The little girl stated that Jonah was swallowed by a whale.

Irritated, the teacher reiterated that a whale could not swallow a human; it was physically impossible.

The little girl said, 'When I get to heaven I will ask Jonah'.

The teacher asked, 'What if Jonah went to hell?'

The little girl replied, 'Then you ask him'.

A Kindergarten teacher was observing her classroom of children while they were drawing. She would occasionally walk around to see each child's work.

As she got to one little girl who was working diligently, she asked what the drawing was.

The girl replied, 'I'm drawing God.'

The teacher paused and said, 'But no one knows what God looks like.'

Without missing a beat, or looking up from her drawing, the girl replied, 'They will in a minute.'

A Sunday school teacher was discussing the Ten Commandments with her five and six year olds.

After explaining the commandment to 'honour' thy Father and thy Mother, she asked, 'Is there a commandment that teaches us how to treat our brothers and sisters?'

From the back, one little boy (the oldest of a family) answered, 'Thou shall not kill.'

One day a little girl was sitting and watching her mother do the dishes at the kitchen sink. She suddenly noticed that her mother had several strands of white hair sticking out in contrast on her brunette head.

She looked at her mother and inquisitively asked, 'Why are some of your hairs white, Mum?'

Her mother replied, 'Well, every time that you do something wrong and make me cry or unhappy, one of my hairs turns white.'

The little girl thought about this revelation for a while and then said, 'Mummy, how come ALL of grandma's hairs are white?'

I love this one!!!

The children had all been photographed, and the teacher was trying to persuade them each to buy a copy of the group picture.

'Just think how nice it will be to look at it when you are all grown up and say, 'There's Jennifer, she's a lawyer,' or 'That's Michael, He's a doctor.'

A small voice at the back of the room rang out, 'And there's the teacher, she's dead.'

The children were lined up in the cafeteria of a Catholic elementary school for lunch. At the head of the table was a large pile of apples. The nun made a note, and posted on the apple tray:

'Take only ONE . God is watching.'

Moving further along the lunch line, at the other end of the table was a large pile of chocolate chip cookies.

A child had written a note, 'Take all you want. God is watching the apples...'