

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

**SAMUEL J. SWIGER, and
BRENDA FRAZIER SWIGER,**
individually, and as next of friend of
JOSEPH SHAWN SWIGER, an infant
and **FRANK YABLONSKY, CHERYL HALL,**
KEN BONNETTE, VINCE OPALINSKI,
ANDREW SORINE, GRAFTON CHURCH
OF GOD, ELIZABETH QUINTANA,
PAMELA NELSON, and RUSSELL A. IRWIN, all individually,
and as Representatives of the Class of
other similarly situated individuals,

Plaintiffs,

v.

/ / Civil Action No. 98-C-298
[Judge Robert B. Stone]

**AMERIGAS PROPANE, INC.,
AMERIGAS PROPANE, L.P., and any**
other related entities of UGI Corporation, and
JAMES WALTERS, and
NISOURCE, INC.,
COLUMBIA ENERGY GROUP, and
COLUMBIA PROPANE CORPORATION,
and any other related entities of NiSource, Inc.

Defendants.

**FINAL ORDER AND JUDGMENT AND RETENTION OF JURISDICTION
TO COMPLETE CLAIMS ADMINISTRATION**

On the 10th day of August, 2011, the Parties appeared before the Court for a Formal Fairness Hearing on their "Joint Motion for Final Approval of Class Action Settlement," requesting a final order and judgment exercising personal jurisdiction over the Class Members, certifying a Settlement Class consistent with the Class Definition approved by the Court, finding that the settlement is fair, reasonable, adequate and not a product of collusion, authorizing the payment of attorneys' fees and expenses, authorizing incentive payments to the Named Class Representatives, authorizing payment of claims filed to date, and granting final approval of the settlement pursuant to West Virginia Rule of Civil Procedure 23(e), including dismissal with prejudice, of the claims asserted against the Defendants in this class action, but retaining jurisdiction over the Parties and all Class Members for the purpose of further administration of the settlement in this case.

Upon consideration of the Joint Motion for Final Approval of Class Action Settlement, the Memorandum in support thereof and the entire Record in this case, the Court **FINDS** that personal jurisdiction exists over the Class Members because notice was reasonable and such notice afforded an opportunity to be heard and to opt-out to any potential Class Member as required by Rule 23 of the West Virginia Rules of Civil Procedure and the case law. *See generally, In re Serzone Products Liability Litigation, 231 F.R.D. 221, 231 (S.D. W.Va. 2005).*

The Court also **FINDS** that the notice provided to those persons with propane systems in this State that would be class members pursuant to the Class Definition as approved by the Court, gave adequate notice to allow those persons to make a determination whether to remain in the Class or to withdraw. The publication in newspapers throughout the State, as well as the direct mailing to over 25,000 former customers of Defendants AmeriGas and Columbia Propane is adequate and fair, and complies with the notice provisions of Rule 23 and due process standards governing class actions. The Parties also provided notice though the internet by a website titled, wvamerigasclassaction.com. This website enabled those potential Class Members to receive information including copies of the Notice, Claim Form, the Settlement Agreements, frequently asked questions with answers and various Orders of the Court. It also provided a toll free telephone number for potential Class Members to call with questions and an e-mail link to send and receive information and answers to any questions. The fact that no potential Class Member has objected to the settlement, for any reason, including lack of reasonable notice and opportunity to be heard further indicates that the notice was adequate and also that the settlement is fair. The Court believes such an inference is reasonable as more than 17,637 direct mail notices were delivered by the U.S. Postal Service which when considering the Statewide newspaper publication, would

indicate that a great number of potential class members had actual and constructive notice without any objections being filed.

Further, because no Class Member has objected to certification of a settlement class as preliminarily and conditionally certified in this Court's preliminary approval Orders entered on October 28, 2010 with regard to the NiSource settlement and January 13, 2011 with regard to the AmeriGas settlement, and because the requests for exclusion from the proposed class settlement were less than fifteen (15) persons, the Court finds it appropriate to **CERTIFY** a Settlement Class, consisting of the following Settlement Class Definitions:

For the AmeriGas Defendants:

"The Settlement Class shall consist of any person who between October 18, 1994 and December 31, 2005:

- (1) had a propane system on their property located in West Virginia,
- (2) which propane system was owned, used, operated, installed, fueled, serviced or maintained by the AmeriGas Defendants and/or Released Parties, and,
- (3) has a Settled Claim as that term is defined herein.

The Settlement Class shall not consist of a cylinder customer of AmeriGas unless such customer's cylinder was relocated or replaced or whose cylinder propane line was adjusted or replaced as part of the Remediation."

The Agreement defines "Settled Claims" under Section " I. (E) Definitions" as:

"E. Settled Claim. Settled Claim shall include any and all claims of Settlement Class Members as alleged in this case, or that could have been alleged in this case, against the AmeriGas Defendants or any of the Released Parties in any pleading, whether known or

unknown, arising out of any factual allegation, claim, cause of action or request for damages or other relief specifically relating to the following:

(a) those claims asserted by the Plaintiff Class Representatives in this action, individually and as representatives of the Class, for Settlement Class Members who during the time period between October 18, 1994 and December 31, 2005 had an inspection of their property related to the allegations of this case, including any inspection wherein the Settlement Class Members' surface property was disturbed by digging or otherwise, and/or whose propane system in whole (or line, riser, cylinder or conduit separately) was replaced, moved, or repaired as a result of the allegations in this case, occurring during the AmeriGas 2000 Inspection Project, the 2001 Line Replacement Project, the 2002 AmeriGas inspection of a sub-group of former CPC customers, or the Protocol Project during calendar years 2002 through 2005 (collectively the "Remediation"), also including the claims of any person who became an Amerigas customer between July 1, 2003 and December 31, 2005 and who was not part of the Remediation but only as their claims relate to the failure to provide riser protection or conduit sealing, but not including any claims for improper burial depth or relating to the type of materials used for such underground lines (i.e. type of copper tubing and conduit); or

(b) claims based upon the AmeriGas Defendants and other Released Parties' alleged failure to bury, install, inspect, maintain or rebury or reinstall Settlement Class Members' propane lines to an appropriate depth or with appropriate protection or material, alleged failure to properly install, inspect or protect the risers for such buried propane lines, or alleged failure to properly inspect or seal the conduit when conduit was utilized for such propane lines, including any related claims, such as claims for failure to warn, misrepresentation, fraud, conspiracy, violations of the West Virginia Consumer Credit and Protection Act contained in Chapter 46A of the West Virginia Code, negligence, nuisance, outrageous conduct, and breach of expressed and implied warranties, but not including the claims of any persons becoming Amerigas customers between July 1, 2003 through December 31, 2005 and who were not part of the Remediation which claims relate to improper burial depth or the type of materials used for such underground lines (i.e. type of copper tubing and conduit); or

(c) including all damages asserted, or which could have been asserted in this case, such as any damages for property disturbance, annoyance, lost wages, compensatory damages, aggravation and inconvenience, penalties, punitive damages, and other such damages relating to the inspection, repair or replacement, or need for the inspection, repair or replacement of Settlement Class Member's propane systems relating to or resulting from the allegations in this case including claims described in subparagraphs (a) or (b) above but not including the claims of any persons becoming Amerigas customers between July 1, 2003 through December 31, 2005 and

who were not part of the Remediation, which claims relate to improper burial depth or the type of materials used for such underground lines (i.e. type of copper tubing and conduit).

The purpose of this defined term Settled Claim(s) is to acknowledge that the Settlement Class Members are releasing any and all claims or damages asserted, or which could have been asserted, by the Settlement Class against the AmeriGas Defendants and Released Parties, which relate to the allegations made or that could have been made in the complaints regarding the burial depth and protection of such buried propane lines and the materials used in that process, failure to protect the risers and/or failure to seal the conduit when utilized, except for those Amerigas customers acquired after July 1, 2003 through December 31, 2005 who were not part of the Remediation as those persons' release will only pertain to claims for failure to provide riser protection or conduit sealing, but will not include claims for improper burial depth or claims relating to the type of materials used for such underground lines (i.e. type of copper tubing and conduit).

Provided further however, nothing contained in this Settlement Agreement shall release the AmeriGas Defendants or any of the Released Parties from any claims for personal injury or property damage now asserted by any Settlement Class Members in a case other than this case, or which may be asserted in the future by any person including Settlement Class Members other than that specifically released by this Settlement Agreement, whether such claims are pending or have yet to be asserted, due to any explosion, fire or other calamity involving such person's propane system. To the best of knowledge of Class Counsel as of the date of execution of this Settlement Agreement, no such claims exist.

Provided further however, nothing contained in this Settlement Agreement shall release the Settling Defendants¹ or any of the Released Parties from any of the Plaintiffs' claims or any other party's claims against any person or entity, including, any Amerigas Defendant, regarding the allegations and causes of action asserted in the pending case styled "Samuel J. Swiger et. al. v. United Valley Insurance Company, et. al., Civil Action 05-C-91-3 [remanded and consolidated in the Circuit Court of Harrison County, W. Va.]."

For the NiSource Defendants:

"The Settlement Class shall consist of any person who:

¹ "Settling Defendants" as used in the Amerigas settlement with Plaintiffs means, AmeriGas Propane Inc., AmeriGas Propane, L.P. and James Walters.

- (1) had a propane system on their property located in West Virginia,
- (2) which propane system was owned, used, operated, installed, fueled, serviced or maintained by the Settling Defendants² and/or Released Parties, and,
- (3) has a Settled Claim as that term is defined herein."

Because the Settlement Class definition incorporates by reference the defined term "Settled Claims" the Court approves that term as well, which is as follows:

"E. Settled Claims. Settled Claims shall include any and all claims as alleged in this case against the Settling Defendants or any of the Released Parties (as defined herein) in any pleading, whether known or unknown, arising out of any factual allegation, claim, cause of action or request for damages, relating to any CPC propane system for claims relating to the following:

- (a) those claims asserted by the Plaintiff Class Representatives in this action, individually and as representatives of the Class, for Settlement Class Members who during the time period between October 18, 1994 and December 31, 2005 had a physical inspection of their property related to the allegations of this case, including any inspection wherein the Settlement Class Members's surface property was disturbed by digging or otherwise, and/or, during the same time period, whose propane system was replaced or repaired as a result of the

² "Settling Defendants" as used in the NiSource settlement with Plaintiffs means, NiSource Inc., Columbia Energy Group (CEG), NiSource Corporate Services Company, NiSource Finance Corp., and NiSource Insurance Corporation, Inc.; the same term is defined differently because there were separate settlement agreements negotiated at different times by each group of Defendants.

allegations in this case, occurring during the 2000 Random Inspection Project, the 2001 Line Replacement Project or the Protocol Project during calendar years 2002 through and including 2005 (the "Remediation"); or

- (b) claims based upon the Settling Defendants and other Released Parties' alleged failure to bury customers' propane lines to an appropriate depth, failure to protect the risers for such buried propane lines and failure to seal the conduit when conduit was used for such propane lines, including any related claims, including claims for misrepresentation, fraud, conspiracy, claims brought pursuant to the West Virginia Consumer Credit and Protection Act contained in Chapter 46A of the West Virginia Code, negligence and breach of expressed and implied warranties; or
- (c) including all damages as alleged in this case such as any damages for property disturbance, annoyance, aggravation and inconvenience, penalties, punitive damages, and other such damages relating to the inspection, repair or replacement, or need for the inspection, repair or replacement of Settlement Class Member's propane systems resulting from the allegations in this case, as modified by the pleadings and Orders of the Court.

The purpose of this defined term Settled Claim(s) is to acknowledge that the Settlement Class Members are releasing any and all claims or damages asserted, or which could have been asserted, by the Settlement Class, which relate to the

allegations predicated upon the factual assertions regarding burial depth of propane lines, failure to protect the risers and/or failure to seal the conduit when utilized.

Provided however, that nothing contained in this Partial Settlement Agreement shall preclude Settlement Class Members from asserting and recovering damages from the AmeriGas Defendants for any of AmeriGas' acts or omissions concerning the CPC Propane Systems after August 21, 2001, which by way of illustration and not limitation includes acts or omissions involving the Remediation.

Provided further that Settlement Class Members acknowledge and agree that the settlement under this partial Settlement Agreement constitutes the total recovery they will seek for any acts or omissions, at anytime, by the Settling Defendants but as to CPC, only for any acts or omissions occurring on or prior to August 21, 2001, and to the extent that Plaintiffs continue to prosecute claims against the AmeriGas Defendants related to CPC Propane Systems, that such claims relate solely to independent acts or omissions undertaken by the AmeriGas Defendants after August 21, 2001, for any injury or damage suffered by Plaintiffs after August 21, 2001. Settling Defendants represent that they had no part in the Remediation including but not limited to, consultation, payment, or any other participation. Based on such representation, Settlement Class Members acknowledge and agree that the Settling Defendants

were not involved in, and had nothing to do with, the Remediation. Provided further however, nothing contained in this Settlement Agreement shall release the Settling Defendants from any claims for personal injury or property damage now asserted by any Settlement Class Members in a case other than this case, or which may be asserted in the future by any person including Settlement Class Members other than that specifically released by this Settlement Agreement, whether such claims are pending or have yet to be asserted, due to any explosion, fire or other calamity involving such person's propane system. To the best of knowledge of Class Counsel as of the date of execution of this Settlement Agreement, no such claims exist."

The Court further **FINDS** because no objections have been filed by any Class Member to the proposed settlement, that therefore, the Court must assume that all such potential Class Members who received notice by direct mail, publication or otherwise, do not object to the settlement, and therefore, consent to it.

The Court further **FINDS** that the proposed settlement is fair, reasonable, adequate and not the product of collusion in accordance with Rule 23. The Court **FINDS** that at the time the case was settled there had been many years of intense and vigorous litigation where almost every issue was contested including several matters that were appealed to the West Virginia Supreme Court of Appeals.

The Court also **FINDS** that the discovery was extensive by all sides and that such discovery thoroughly vetted all of the significant issues in the case. Thus, the Court **FINDS** that the proposed settlement is a product of vigorous and adversarial proceedings.

The Court further **FINDS** that the settlement is adequate after considering the relative strength of the Parties' case on the merits, the potential difficulties in trying the case, as well as the potential defenses of the Defendants if the case were to go to trial, as well as the additional expense that a trial would have created and the risk that any jury trial presents.

After reviewing all of these factors, the Court **FINDS** that the Settlement Agreements in this case meet the fairness test because they have been negotiated over a period of years at arms length, between counsel, at times through the use of an experienced mediator. This action has been pending for more than 10 years generating many pleadings, hearings and appeals. During that time, Plaintiff Class Representatives have actively pursued discovery, including having their depositions taken by the Defendants. Hundreds of thousands of pages of discovery were produced by the Defendants and Plaintiffs' deposed numerous of the Defendants' key personnel producing thousands of pages of deposition transcripts. Plaintiff Class Representatives have retained several expert witnesses in the field of propane safety and propane system installation to advise them in this matter. All of the above culminated in intensive settlement negotiations by the Parties resulting in the proposed Settlement Agreements.

The Court further **FINDS** that the Settlement Agreements are also adequate. Although each side believes they have strong claims and defenses, there is no certainty that either side will prevail if the settlements are not approved and litigation continues. Moreover, the Defendants have continued to deny liability and will continue to challenge Plaintiff Class Representatives' claims if the case is not resolved through settlement. There are numerous issues that could be decided by a fact finder adversely to either of the Parties, which in that instance, could result in significant loss of specific claims and perhaps loss of the entire case. It is axiomatic to state that continued litigation would be extremely expensive, especially a trial which may last more than a month.

The solvency of the Defendants was not an issue but the Settlement Agreements have established a Settlement Fund into which the settlement monies have already been contributed, as well as an agreement for the Defendants to pay up to \$625,000.00 of claims administration costs.

Based on all of the above, this Court **FINDS** that the Settlement Agreements with the Defendants are fair, reasonable and adequate and are accordingly **APPROVED AND RATIFIED**.

In accordance with the terms and conditions of the Settlement Agreements, the Court hereby dismisses all claims against the Defendants with prejudice and with costs to be awarded solely as provided in the Settlement Agreements, except that (a) the claims of the 12 opt-out Class Members listed in "**Plaintiffs' Exhibit 1**", introduced at the hearing shall be dismissed without prejudice; and (b) the Court shall retain jurisdiction over all of the Parties and Class Members to the extent necessary to enforce the Settlement Agreements and Orders of this Court and to administer future claims administration proceedings in this case including any proposals to expand class participation in this settlement; also at the request of the Parties, the Court, perceiving no just reason for delay, expressly **DIRECTS**, pursuant to Rule of Civil Procedure 54(b), that final Judgment be entered regarding dismissal of all claims against the Defendants with prejudice in accordance with the terms and conditions of the Settlement Agreements.

Further the Court **BARS** and **ENJOINS** all Class Members from ever asserting any claims against any Defendant or Released Party as asserted in this action as identified and defined in the Parties' Settlement Agreements, which occurred from October 18, 1994 though and including December 31, 2005, with the exception that opt-out Class Members' claims shall not be barred and enjoined.

Further the Court **FINDS** that the Defendants have waived their right to assert a triggering of the Walk-Away Rights as defined in the Settlement Agreements as the opt-outs filed have been less than 1% of the total claim forms received.

Further the Court **ORDERS**, consistent with the Settlement Agreements, that the escrowed funds currently in two separate escrow accounts in BB&T Bank and MVB Bank be converted or transferred to a Qualified Settlement Fund within the meaning of Section 468(B) of the Internal Revenue Code with the Tax Identification Number 45-xxxx991, all to be used to pay the class member damages, attorneys' fees and litigation expenses and incentive payments, all as set forth in the Settlement Agreements.

Further, the Court **ORDERS**, consistent with the Settlement Agreements, the granting of the attorneys' fees and litigation expenses, as preliminarily approved by this Court in its Order dated March 31, 2011, all to be paid from the Settlement Fund upon specific request by Plaintiffs' counsel and upon Order of the Court for the escrow agent to make such payments.

Further, the Court **ORDERS**, consistent with the Settlement Agreements, the granting of the incentive payments, in the amount of \$10,000.00 to each of the ten (10) Named Class Representatives [the Swiger family is considered as one person], all to be paid from the Settlement Fund upon the entry of a separate Order of this Court directing the Escrow Agent to make such payments.

Further, the Court **ORDERS**, consistent with the Settlement Agreements, that the Defendants pay up to \$625,000.00 for claims administration expenses in proportion to their settlement fund contributions as set forth in the Settlement Agreements.

Further, the Court **ORDERS**, that the Parties may submit additional methods and procedures that may enhance a greater participation by other potential Class Members in the settlement with the goal of increasing the amount of disbursement of the settlement fund to such persons or entities entitled to such payments in this class action settlement.

All of the above is so **ORDERED**.

The Clerk of this Court is **DIRECTED** to send a certified copy of this Order to the below identified counsel of record and the Claims Administrator at the addresses listed below.

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ENTER: *August 12, 2011*

Robert B. Stone
JUDGE ROBERT B. STONE

Agreed for Entry by:

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STATE OF WEST VIRGINIA SS:

I, Jean Friend, Clerk of the Circuit Court and
Family Court of Monongalia County State
along with the undersigned, do hereby certify that the attached
Order is a true copy of the original Order
made and entered by said Court.

Jean Friend
Circuit Clerk

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