Will Delay Rentals Excuse Failure to Protect against Drainage: Rogers v. Heston Oil Co.

Cynthia LeMay
WILL DELAY RENTALS EXCUSE FAILURE TO
PROTECT AGAINST DRAINAGE?
ROGERS v. HESTON OIL CO.

I. INTRODUCTION

In Rogers v. Heston Oil Co.,\(^1\) the Oklahoma Supreme Court reversed
the long-standing Oklahoma doctrine regarding the effect of the lessor's
acceptance of delay rental payments on the lessee's implied covenant to
protect the leased premises against drainage. The old rule, enunciated in
Eastern Oil Co. v. Beatty\(^2\) and reiterated in Carter Oil Co. v. Samuels,\(^3\)
ddictated that the lessor's acceptance of delay rentals, with knowledge
that oil or gas was being drained from the leasehold at the time of accep-
tance, constituted a waiver of the lessor's right to maintain an action
against the lessee for breach of the implied covenant to protect against
drainage.\(^4\) A majority of other jurisdictions follow this approach.\(^5\) The
court in Rogers, however, overruled Eastern and Carter, rejected the ma-
ajority rule, and held that "payment and acceptance of delay rental . . .
does not in and of itself constitute a waiver of an implied covenant on
the part of the lessee to protect the lessor from drainage."\(^6\) This Note will
examine the ramifications of the Rogers decision and compare the views
of various jurisdictions regarding the interdependence of the drilling de-
lay rental clause and the implied covenant to protect against drainage.

II. GENERAL PRINCIPLES

The implied covenant to protect against drainage\(^7\) provides that ab-
sent express lease provisions to the contrary, the oil and gas lessee must
protect the leased premises against drainage of substantial quantities of
oil or gas from a common reservoir caused by producing wells on adja-

\(^1\) 55 OKLA. B.J. 2124 (Oct. 16, 1984).
\(^2\) 71 Okla. 275, 278, 177 P. 104, 106 (1918).
\(^3\) 181 Okla. 218, 219, 73 P.2d 453, 455 (1937).
\(^4\) Eastern, 71 Okla. at 278, 177 P. at 106; Carter, 181 Okla. at 219, 73 P.2d at 455.
\(^5\) See generally, 5 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 826.2 (1977) (for a
discussion of effect of acceptance of delay rental payments).
\(^6\) Rogers, 55 OKLA. B.J. at 2126.
\(^7\) The implied covenant to protect against drainage is referred to by some authorities as the
protection covenant, the drainage covenant, the offset well covenant, or the covenant for the protec-
tion of boundary lines. See, e.g., 5 H. WILLIAMS & C. MEYERS, supra note 5, § 821; Cummings v.
In order to establish a breach of the covenant, the lessor must prove that substantial drainage has occurred on the leasehold, and that an offset well would probably be profitable, i.e., it would produce oil or gas in quantities sufficient to repay the costs of drilling, completing, equipping and operating the well, in addition to returning a reasonable profit on the investment. The principal test applied in determining whether the lessee has performed the obligations imposed by the implied covenant to protect against drainage is the prudent operator standard—whether a prudent operator would have drilled an offset well or taken other action to protect against drainage. Some jurisdictions have altered this standard slightly where it appears that the lessee is operating the draining well himself.

There are two distinct views regarding the effect of an acceptance of delay rental payments on the implied covenant to protect against drainage. Delay rental payments are payments of a stipulated sum of money from the lessee to the lessor in periodic installments for the privilege of postponing the drilling of an initial well during the primary term of the lease; these payments have the effect of negating the implied covenant to drill an exploratory well.
The older, majority rule states that the lessor’s acceptance of delay rental payments constitutes a waiver of the right to bring an action for breach of the implied covenant to protect against drainage, if at the time of acceptance the lessor knew that the drainage was occurring. The new, minority view that acceptance of delay rental payments does not, in and of itself, waive the right to recover for breach of the implied covenant to protect against drainage seems to be gaining noteworthy acceptance. Jurisdictions that embrace the majority view, and thus are more reluctant to attach drainage liability to the lessee, create an exception and thereby impose liability when the lessee is draining the leasehold from a contiguous tract. The so-called “fraudulent drainage” decisions fall into three broad categories:

1. Cases where the court considered the drainage unimportant,

2. Cases where the court held that fraudulent drainage did not alter the ordinary rules of liability,

3. Cases where the court held that fraudulent drainage did not alter the ordinary rules of liability.

14. Id.; Woodruff, supra note 9; Jones, Rights and Remedies for Non-Development and Failure to Offset (Legal Aspects), 4 ANN. INST. ON OIL AND GAS LAW AND TAX’N. 57 (1953).


16. Although one case implies that acceptance of delay rentals by a lessor who does not know of the drainage will not prevent enforcement of the implied covenant to protect against drainage (Orr v. Comar Oil Co., 46 F.2d 59, 63 (10th Cir. 1930)), there are apparently no cases where the presence or absence of the lessor’s knowledge was the determinative factor. Most of the cases apply the rule in terms of acceptance with knowledge of drainage. See Clear Creek Oil & Gas Co. v. Brunk, 160 Ark. 574, 255 S.W. 7, 8 (1923); Carter Oil Co. v. Samuels, 181 Okla. 218, 220, 73 F.2d 453, 455 (1937).

17. Rogers v. Heston Oil Co., 55 OKLA. B.J. 2124 (Oct. 16, 1984); Texas Co. v. Ramsower, 7 W.S.W. 872, reh’g denied, 10 S.W.2d 537 (Tex. Comm. App. 1928); see generally 5 E. KUNTZ, supra note 8, § 61.2; 5 H. WILLIAMS & C. MEYERS, supra note 5.

18. See supra note 17 and cases and authorities cited therein.

19. See supra notes 15-16 and accompanying text.

20. Amoco Prod. Co. v. Alexander, 622 S.W.2d 563 (Tex. 1981); 5 H. WILLIAMS & C. MEYERS, supra note 5, § 824; see also, Woodruff, supra note 9 at 203; 5 E. KUNTZ, supra note 8, § 61.2.


III. **ROGERS v. HESTON OIL CO.**—THE NEW OKLAHOMA RULE

A. **Summary of Facts**

Rogers sued Heston Oil Company for damages arising from Heston's alleged breach of the implied covenant to protect the leased premises against drainage, specifically Heston's producing well on a contiguous lease that allegedly drained Rogers' tract. The Seminole County District Court granted Heston's motion for summary judgment because Rogers had accepted delay rentals. The Oklahoma Court of Appeals affirmed the district court's ruling.

Rogers granted an oil and gas lease on her property. The original lessee subsequently assigned the lease to Heston Oil Company and its co-defendant, Marsh Oil and Gas Company. The lease stipulated a three year primary term and an "unless" type delay rental clause, which provided that if the first well drilled on the lease resulted in a dry hole, delay rentals would not be due again until 12 months after the expiration of the last rental period for which delay rentals had been paid. In effect, the lessee's drilling of a dry hole would substitute for its having to pay delay rental payments in the lease year succeeding the year for which the lessee had last paid delay rentals.

Eight months after Rogers leased her property, the defendants completed a commercially producing well on adjacent un pooled acreage, a scant 330 feet from the common boundary line. The defendants, who held the lease and operated the well on the adjacent tract, had not yet...
pursued any drilling activity on the plaintiff's lease.\(^\text{33}\)

As the lease required,\(^\text{34}\) the defendants paid delay rentals for the second lease year by depositing the payment in the plaintiff's bank account when the payment became due.\(^\text{35}\) The district court deemed the plaintiff to have accepted the payment when the defendants deposited it in her account. During the same lease year, however, the defendants drilled a dry hole, the Morgan well, on the plaintiff's lease.\(^\text{36}\) Consequently, the lease required no further delay rental payments until 12 months after the expiration of the last rental period, or during the third lease year.\(^\text{37}\)

When the plaintiff discovered the producing well on the adjacent tract during the second lease year, she demanded in writing that defendants either drill a protection well\(^\text{38}\) or pay her an offset royalty.\(^\text{39}\) Defendants did not respond to the plaintiff's demand, but paid a delay rental payment for the third lease year, a payment which was not then due to the plaintiff because the dry Morgan well had already secured for the defendants the right to delay drilling during the third lease year.\(^\text{40}\) Again, the payment was implicitly accepted by the plaintiff when it was deposited into her bank account.\(^\text{41}\) When the defendants ignored a second written demand for a protection well or offset royalties, the plaintiff sued.\(^\text{42}\)

The trial court granted the defendants' motion for summary judgment based on the well-established rule of \textit{Carter Oil Co. v. Samuels},\(^\text{43}\) that the lessor's acceptance of delay rental payments with knowledge that oil or gas is being drained at the time payment is made constitutes a waiver of his right to maintain suit against the lessee for failure to protect

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\(^{33}\) Id.

\(^{34}\) Id.

\(^{35}\) Id.

\(^{36}\) Id.

\(^{37}\) Id.

\(^{38}\) A protection well, also referred to as an offset well, is a well drilled on a lease to "protect" or "offset" drainage caused by a well on an adjacent tract. Because of the fugacious nature of oil and gas, they may migrate from their normal position to one of less pressure, i.e., where the earth has been pierced by a producing well. \textit{See generally} 8 H. WILLIAMS & C. MEYERS, \textit{OIL AND GAS LAW—MANUAL OF TERMS} (1984).

\(^{39}\) 55 Okla. B.J. at 2125. An offset royalty is compensation paid by the lessee to the lessor to "offset" or "compensate" for the minerals which have been extracted by the draining well. \textit{See generally} 8 H. WILLIAMS & C. MEYERS, \textit{supra} note 38, at 568.

\(^{40}\) 55 Okla. B.J. at 2125.

\(^{41}\) Id.

\(^{42}\) Id.

\(^{43}\) 181 Okla. 218, 73 P.2d 453 (1937).
the premises against drainage.\textsuperscript{44} The Oklahoma Court of Appeals agreed that \textit{Carter} was determinative of the matter and affirmed the trial court's summary judgment.\textsuperscript{45} On certiorari, the Oklahoma Supreme Court reversed the \textit{Rogers} decision, explicitly overruling \textit{Carter} and "the cases subsequently likewise so holding."\textsuperscript{46}

B. \textit{The Issue}

The preliminary factual determination before the \textit{Rogers} court was simply whether the plaintiff may be considered to have "accepted"\textsuperscript{47} the payment of delay rentals for a period when they were not due,\textsuperscript{48} thus waiving her right to maintain an action against the defendants for breach of the implied covenant to protect against drainage.\textsuperscript{49} If the court found that the plaintiff had "accepted" a gratuitous delay rental, thereby waiving her action for failure to protect against drainage, it would then apparently face the secondary issue, i.e., whether Oklahoma would accord any significance to the fact that the defendants caused the very drainage that they failed to mitigate with an offset well, so-called "fraudulent drainage."\textsuperscript{50}

The court could have reversed defendants' summary judgment and still retained the \textit{Carter} rule either by finding that a lessor is legally incapable of "accepting" an unrequired delay rental and thus had waived nothing, or by holding that, notwithstanding an otherwise valid waiver, the draconian rule of \textit{Carter} does not protect a lessee who is the perpetrator of the unprotected drainage. Instead of using these narrow methods to circumscribe \textit{Carter}, the court chose to overrule it by framing the issue in a manner which was broader than the facts warranted:

\begin{quote}
[Whether an oil and gas lessor, by accepting payment of delay rentals, even if timely made in accordance with the terms of the lease contract, with knowledge on the part of the lessor that oil or gas is being drained from his premises at the time that payment is made, thereby waives his right to recover damages for such drainage during the time covered by
\end{quote}

\begin{footnotes}
\item[44.] Id. at 219, 73 P.2d at 455. \textit{Accord}, Eastern Oil Co. v. Beatty, 71 Okla. 275, 177 P. 104 (1918).
\item[45.] 55 Okla. B.J. at 2124.
\item[46.] Id. at 2127.
\item[47.] See infra note 89 and accompanying text. Generally, when the lease provides that payment of delay rentals may be made by deposit in a specified bank to the credit of the lessor, the payment is presumed to be accepted when the deposit is made. 3 E. Kuntz, supra note 8, \S 34.4(6).
\item[48.] The delay rentals were not due for the third lease year because of the previously drilled dry hole. See supra notes 28-30 and accompanying text.
\item[49.] 55 Okla. B.J. at 2125.
\item[50.] Id. at 2127. The \textit{Rogers} court did not use the term "fraudulent drainage" as such, but it did modify the "prudent operator" standard to make it applicable to fraudulent drainage situations.
\end{footnotes}
the delay rental payment.\footnote{51}{Rogers, 55 Okla. B.J. at 2126.}

Addressing the issue in this manner inevitably cast doubt on the holdings in *Eastern Oil Co. v. Beatty*\footnote{52}{71 Okla. 275, 177 P. 104 (1918).} and *Carter Oil Co. v. Samuels*,\footnote{53}{181 Okla. 218, 73 P.2d 453 (1937).} compelling the court to ask the broader question

whether the implied covenant of protection against drainage, thus included within the lease agreement, is a separate and independent covenant from the delay rental covenant, so that the payment and acceptance of delay rentals under the written terms of the lease by the lessor with knowledge of drainage by adjacent or adjoining producing leases in and of itself constitutes a waiver of the implied covenant.\footnote{54}{Rogers, 55 Okla. B.J. at 2127.}

The question of the relationship between the two covenants lead the court to re-examine the theoretical bases of the implied covenant to protect against drainage, the implied covenant to develop the lease, and the delay rental clause.\footnote{55}{Id.}

C. **Oklahoma Law Prior to Rogers**

The Oklahoma Supreme Court recognized the implied covenant to protect against drainage in *Eastern Oil Co. v. Beatty*.\footnote{56}{71 Okla. 275, 177 P. 104 (1918).} *Eastern* involved two distinct classifications of delay rental payments—those that the lessor had accepted and those that the lessor had refused.\footnote{57}{Id. at 276, 177 P. at 105.} As to the period for which the lessor had accepted delay rentals,\footnote{58}{The delay rentals had been accepted after the lessor had demanded that the lessee drill an offset well. *Id.*} the court summarily dismissed the lessor’s claim for damages arising from the lessee’s failure to protect the leased premises from drainage.\footnote{59}{Id.} The *Eastern* court followed a 1916 West Virginia Supreme Court of Appeals decision, *Carper v. United Fuel Gas Co.*\footnote{60}{78 W. Va. 433, 89 S.E. 12 (1916).} which appeared to the *Eastern* court to be “sound and to accord with the highest sense of justice and right.”\footnote{61}{Eastern, 71 Okla. at 277-78, 177 P. at 106.} The lessor in *Carper* could not recover damages\footnote{62}{In West Virginia at the time of the *Carper* case, the remedy for breach of the implied covenant to protect against drainage was damages, not forfeiture. *Id.; see also* Stanley v. United Fuel Gas Co., 78 W. Va. 793, —, 90 S.E. 344, 345 (1916).} for drainage that he suffered by reason of the lessee’s failure to drill offset wells during the period covered by payments made and accepted in lieu of drilling a

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52. 71 Okla. 275, 177 P. 104 (1918).
55. *Id.*
56. 71 Okla. 275, 177 P. 104 (1918).
57. *Id.* at 276, 177 P. at 105.
58. The delay rentals had been accepted after the lessor had demanded that the lessee drill an offset well. *Id.*
59. *Id.*
60. 78 W. Va. 433, 89 S.E. 12 (1916).
61. *Eastern*, 71 Okla. at 277-78, 177 P. at 106.
62. In West Virginia at the time of the *Carper* case, the remedy for breach of the implied covenant to protect against drainage was damages, not forfeiture. *Id.; see also* Stanley v. United Fuel Gas Co., 78 W. Va. 793, —, 90 S.E. 344, 345 (1916).
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well (i.e., drilling delay rental payments). The Eastern court found the Carper result to be particularly attractive, stating:

The lessor [in Carper] having accepted the agreed compensation for delay in operations, manifestly he should not be permitted to recover in addition thereto as damages the value of his share of the oil and gas drained from the leased premises during the time covered by such payments ... They [the plaintiff-lessee in Eastern] accepted payments for delay subsequent to giving that notice and making that demand, and thereby clearly waived any right which they may have had to claim a forfeiture for failure to drill an offset well, and thereby protect against drainage during the time covered by the payments accepted. ... 65

Not only did the Eastern decision recognize the existence of an implied covenant to protect against drainage, but it also marked the beginning of Oklahoma's adherence to the majority rule that payment and acceptance of drilling delay rentals constitutes a waiver of the right to recover for breach of the implied covenant to protect against drainage. 66

The Eastern court's handling of the second disputed period of delay rental payments, those that the lessee had tendered but that the lessor had refused pursuant to his previous notice and demand for a protection well, demonstrates that the waiver operated only during the period covered by the accepted delay rentals. The court stated:

The lessors, having refused to accept the payment due and tendered on that day for further delay, and adhered to the notice then given of their intention to accept no payments thereafter for that purpose, it cannot be held that they have waived any remedy they may have had on account of failure of the lessee to protect the premises against such subsequent drainage. 67

63. Carper, 78 W. Va. at —, 89 S.E. at 17.
64. The appropriate remedy in Oklahoma for breach of the implied covenant to protect against drainage was forfeiture rather than damages. Indiana Oil, Gas & Dev. Co. v. McCrory, 42 Okla. 136, 140 P. 610 (1914); Blackwell Oil & Gas Co. v. Whitesides, 71 Okla. 41, 174 P. 573 (1918) But see Stanley v. United Fuel Gas Co., 78 W. Va. 793, 90 S.E. 344 (1916) (appropriate remedy in West Virginia was damages, not forfeiture).
65. Eastern, 71 Okla. at 275, 177 P. at 106.
66. Id. ("[I]n view of the express provisions of the lease, it would seem doubtful if a covenant to protect the premises against drainage can be implied during the period that payment for delay in drilling a well may be made.").
67. Id. The holding was based on Carper v. United Fuel Gas Co., 78 W. Va. 433, 89 S.E. 12 (1916):

The rule announced in that case is that there is an implied condition that, in the event of such drainage or imminent danger thereof, the lessee will, upon demand of the lessor, drill a well on the leased premises for the prevention of loss of the subject-matter of the lease within the last period for which delay rental has been paid or shall be accepted, or commence one within said period and diligently prosecute the work on it, accompanied by notice of intention to refuse to receive further payment of rentals and declare forfeiture of the lease for failure to drill the same.
Although the *Eastern* court recognized the viability of such a cause of action for breach of the implied covenant to protect against drainage, it did not "feel disposed to adopt it" under the facts presented. The court reasoned that, although the implied covenant to protect against drainage might arise when the lessor demands a protection well and gives notice that he will refuse future delay rental payments, still "there must be actual or threatened drainage in a substantial sense." After examining the prevailing economic conditions, the doubtful profitability of an offset well, and the prudent operator standard, the court decided that "[w]hatever may have been the obligation of the lessee to protect the premises against drainage, under these circumstances it surely cannot be said that there was drainage in a substantial sense, that the obligation to prevent same by drilling an offset arose. . . ." Thus the court denied recovery against Eastern Oil Co.

The holding in *Eastern*, therefore, requires that the lessor give notice of his intention to refuse future delay rental payments and that he demand that the lessee drill a protection well as a prerequisite to recovery for breach of the implied covenant to protect against drainage. If the lessee then refuses to drill a protection well and the lessor sues, then the lessor must still prove the two essential elements of a cause of action for breach of the implied covenant to protect against drainage: substantial drainage, and the probability that a protection well would be profitable.

In the 66 years since the *Eastern* decision, apparently only one other reported Oklahoma case has turned on the interplay of the delay rental clause with the implied covenant to protect against drainage. In 1937, the supreme court decided *Carter Oil Co. v. Samuels* and reiterated the majority rule on facts very similar to the *Rogers* facts. The *Carter* lessee paid delay rentals for two consecutive lease years, which payments were deposited in the lessor's bank account as the lease pro-

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*Eastern*, 71 Okla. at 278, 177 P. at 107 (citing Carper v. United Fuel Gas Co., 78 W. Va. 433, 89 S.E. 12 (1916)).

68. *Id.* at 279, 177 P. at 107.

69. *Id.*

70. *Id.* at 280, 177 P. at 108.

71. *Id.*

72. *Id.* at 278, 177 P. at 107.

73. *Id.* at 279, 177 P. at 107.

74. The *Eastern* rule remained viable in Oklahoma until it was overruled in *Rogers v. Heston Oil Co.*, 55 OKLA. B.J. 2124 (Oct. 16, 1984).

75. 181 Okla. 218, 73 P.2d 453 (1937).

Meanwhile, the lessee had drilled two wells on an adjacent tract that the lessee had also leased. When the lessor discovered that one of the wells on the adjacent lease was draining his property, he demanded that the lessee drill a protection well or pay him an offset royalty. Although the lessee had already drilled two wells on the lessor’s tract, neither well offset the draining well and neither produced in paying quantities.

The plaintiff secured a judgment at trial. On appeal, however, the Oklahoma Supreme Court reversed, relying on Eastern Oil Co. v. Beatty. In so holding, the Court stated:

[It has been held by this court that if the lessor accepts the payment of delay rentals with knowledge that oil or gas is being drained from his premises at the time the payment is made, he waives his right to complain of the drainage during the time covered by such payment. Thus, the court refused to award damages to the plaintiff for the lessee’s breach of the implied covenant to protect against drainage because the lessor accepted the payment of delay rentals with knowledge that oil and gas were being drained at the time.

Oklahoma thereby adopted the rule which a majority of jurisdictions follow. Subsequent Oklahoma cases have followed Eastern and

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77. Carter, 181 Okla. at 219, 73 P.2d at 454.
78. Id. Various other wells had been drilled, apparently by other parties, on leases surrounding the plaintiff’s land, but with these the plaintiff was unconcerned.
79. Id. For a discussion of protection wells and offset royalties, see supra notes 38-39.
80. Carter, 181 Okla. at 219, 73 P.2d at 454.
81. Id.
82. Id.
83. 71 Okla. 275, 177 P. 104 (1918).
84. Carter, 181 Okla. at 219, 73 P.2d at 455 (citing Eastern Oil Co. v. Beatty, 71 Okla. 275, 177 P. 104 (1918)).
85. Id. at 219, 73 P.2d at 455. The threshold determination to be made in Carter was whether or not the lessor had “accepted” the payment of delay rentals; since both parties agreed that had the payments been accepted, the Eastern rule would bar plaintiff’s recovery. The court stated the test for payment and acceptance:
Where it is stipulated in the lease that the lessee may make payment by deposit in a specified bank to the credit of the lessor, the acceptance of such payment is implied by this agreement when the deposit is made pursuant to the stipulation. If the lessor does not wish to accept the delay rentals, it is his duty to give notice to the lessee, before the rental becomes due, that it will not be accepted.

Id. at 219, 73 P.2d at 455 (citing McNutt v. Whitney, 192 Ky. 132, 232 S.W. 386 (1921)). The court also cited Satterfield v. Galloway, 192 Ky. 780, 234 S.W. 448 (1921) (notice to the bank to refuse to accept rental payments prior to time when payment is due is not sufficient); and Kachelmacher v. Laird, 92 Ohio St. 324, 110 N.E. 933 (1915) (when rentals are paid to the bank the fund becomes property of the lessor, and the lessor cannot avoid such effect by refusing to withdraw the sum from the bank). Id. at 219-20, 73 P.2d at 455.
86. See, e.g., Sun Oil Co. v. Oswell, 258 Ala. 326, 62 So. 2d 783 (1953); Carson v. Ozark Natural Gas Co., 191 Ark. 167, 83 S.W.2d 833 (1935); Hood v. Southern Prod. Co., 206 La. 642, 19
Carter in the proper circumstances. 87

D. The Rogers Decision

The Rogers court's decision of the waiver issue was straightforward: a lessor cannot be considered to have accepted drilling delay rental payments that were not due at the time they were paid, 88 and thus no waiver of rights under the implied covenant to protect against drainage could have occurred. 89 Using only this theory, the court could have distinguished Rogers from both Eastern and Carter, because, in the latter cases, delay rentals were due when paid and accepted. 90 By drawing a distinction between the payment and acceptance of agreed delay rentals with knowledge of actual drainage occurring at the time, 91 and a gratuitous payment completely outside the scope of the rights and obligations of the parties to the lease, 92 the court could have resolved the waiver issue in favor of the plaintiff without overruling the long-standing Eastern and Carter doctrine.

Another way the court could have salvaged Eastern and Carter, while reversing the lower court's summary judgment for the Rogers lessee, would have been to create an exception in cases involving "fraudulent drainage." The court could have, for example, recognized that when the lessee himself causes the drainage, he is held to a higher standard. Such a decision would require overruling or modifying only the part of the Carter holding which appeared to place no particular significance on the fact that the lessee himself operated the draining well. 93 The Rogers court chose not to do so, preferring instead to reconsider the validity of the Eastern and Carter doctrine and, ultimately, to overrule those cases entirely. 94

87. See Orr v. Comar Oil Co., 46 F.2d 59, 63 (10th Cir. 1930) (applying Oklahoma law). But cf. Deep Rock Oil Corp. v. Bilby, 199 Okla. 430, 434, 186 P.2d 823, 826 (1947) (lessor entitled to damages upon a showing that there was no "acceptance" of delay rental payments).
88. Rogers, 55 OKLA. B.J. at 2126. Delay rentals were not due for the third lease year because of the dry Morgan well drilled during the second lease year. Id. at 2125.
89. Id. at 2126. Acceptance is crucial to the waiver issue. The court noted that "in order to constitute a waiver, there must be an actual intention to relinquish a known right. . . ." Id. at 2126 (quoting Atlas Life Ins. Co. v. Schrimsher, 179 Okla. 643, 66 P.2d 945 (1937)). The court went on to say that "if the plaintiff 'accepted' the payment (an issue we need not here decide) no waiver is attributable to plaintiff, because the plaintiff simply did not have a right to be waived." Id.
90. See Eastern, 71 Okla. at 276, 177 P. at 105; Carter, 181 Okla. at 219, 73 P.2d at 454.
91. E.g., as in Eastern and Carter.
92. E.g., as in Rogers.
94. Rogers, 55 OKLA. B.J. at 2127.
IV. ANALYSIS OF THE NEW OKLAHOMA RULE

The court in Rogers held that the lessor's acceptance of delay rental payments with knowledge that drainage is occurring at the time of acceptance does not in and of itself constitute a waiver of the lessor's right to recover damages for breach of the implied covenant to protect against drainage. The court based its conclusion on its perception of the "fundamental injustice" that resulted from mechanical application of the old rule. Although courts outside Oklahoma disagree on what is fundamentally just in weighing the effect of the lessor's acceptance of delay rental payments on the lessee's duty to protect against drainage, the clear weight of authority favors the view that the lessor's acceptance of delay rental payments with knowledge that drainage is occurring bars his enforcement of the implied covenant to protect against drainage during the period covered by the rental payment.

A. The Rationale and Application of the Majority Rule

One rationale for the older, majority rule is that the lessor has elected to accept delay rentals as liquidated damages for the minerals that the draining well extracts. In effect, this approach considers the delay rental clause to be a limitation on both the implied covenant to drill an exploratory well and the implied covenant to protect against drainage. Viewed another way, the lessor should not be entitled to both a well and a delay rental on the same lease at the same time. Since drilling a protection well would satisfy both the exploration covenant and the protection covenant, and since paying delay rentals satisfies the

95. Id. at 2128.
96. Id. at 2127.
97. See generally 5 H. WILLIAMS & C. MEYERS, supra note 5.
98. See supra notes 15-16 and cases cited therein; see also 5 H. WILLIAMS & C. MEYERS, supra note 5; E. BROWN, supra note 8; and 5 E. KUNTZ, supra note 8.
99. Typically, delay rentals are not large enough to compensate for the actual loss of minerals through extraction; however, the fact that potential damages at the time the lease is negotiated are so speculative, the courts are willing to consider delay rentals as liquidated damages.
100. See infra note 102.
101. If the oil and gas lease does not contain some provision to the contrary, there is an implied obligation on the part of the lessee to drill an exploratory well. The lease is in jeopardy of cancellation by the lessor if the lessee fails to do so within a reasonable time after demand by the lessor. 3 E. KUNTZ, supra note 8, § 27.1.
103. As noted in Eastern Oil Co. v. Beatty, 71 Okla. at 278, 177 P. at 106:
   Drainage can be prevented only by drilling offset wells, and what has been said with reference to an implied covenant to develop... would seem logically to apply to an implied
obligation to drill an exploratory well, these courts reason that payment of delay rentals also satisfies the protection covenant\(^\text{104}\) and treat the lessor as having made an election to accept the rentals and waive the right to any well, exploratory or protection.\(^\text{105}\)

Many of the decisions recognizing the majority rule rely on a waiver or estoppel theory;\(^\text{106}\) the seeming injustice of permitting a lessor to receive the delay rental, while still holding the lessee liable for drainage occurring during the period covered by delay rentals.\(^\text{107}\)

The courts which follow the majority position permit the lessor to enforce the implied covenant to protect against drainage only after notifying the lessee of the breach, demanding performance, and refusing future delay rental payments.\(^\text{108}\) Under these constraints, the lessor could suffer substantial drainage until the due date of the next delay rental payment, during which time he would be helpless to remedy the drainage.\(^\text{109}\)

Most of the decisions following the majority rule have found or assumed that the lessor knew of the drainage at the time he accepted the delay rental payments.\(^\text{110}\) Dicta in one case,\(^\text{111}\) however, indicates that accept-
ance of delay rental payments by a lessor who does not know of the drainage will not bar enforcement of the implied covenant to protect against drainage. 112

B. Minority Rule Rationale

Few cases 113 espouse the minority view that the lessor may accept the delay rentals with knowledge of occurring drainage yet still maintain an action against the lessee for breach of the implied covenant to protect against drainage. 114 The rationale of the minority rule, however, rests upon sounder reasoning than that of the majority rule.

First, the minority rule comports with the parties' expectations. Typically, the lessor executing a lease that contains a delay rental clause anticipates that the lessee will not drill an exploratory well as long as the lessee pays drilling delay rentals. 115 Delay rentals merely postpone the profits that the lessor hopes to realize from production of minerals beneath his land, 116 a detriment that he is willing to accept in return for the delay rental payments. The lessor probably does not anticipate that the same delay rental will allow his lessee, the putative protector of the lessor's interests, to ignore a neighboring well that is draining the lessor's mineral reserves. 117 In such a case, the lessor's profit is not postponed, but lost altogether. 118 The majority rule thus becomes a trap for the unwary or trusting lessor. Consequently, some courts now apply a more balanced rule, recognizing the drilling delay rental clause as a limitation only on the implied drilling covenant, or the express drilling clause if one is contained in the lease, 119 but not on the lessee's duty to protect the premises against drainage. 120

112. Although the majority rule cases tend to base their decisions on the lessor's knowledge of the drainage, 5 H. WILLIAMS & C. MEYERS, supra note 5, note that the authors "have found no cases where such term became important, that is, where the lessor accepted rentals without knowledge of drainage." 113. See, e.g., Rogers v. Heston Oil Co., 55 OKLA. B.J. 2124 (Oct. 16, 1984); Texas Co. v. Ramsower, 7 S.W.2d 872, reh'g denied, 10 S.W.2d 537 (Tex. Comm. App. 1928); Carper v. United Fuel Gas Co., 78 W. Va. 433, 89 S.E. 12 (1916).

114. See generally 5 H. WILLIAMS & C. MEYERS, supra note 5, § 826.2.

115. In other words, the lessor recognizes the delay rental clause as a limitation on drilling only.

116. For a discussion of this point, see Eastern Oil Co. v. Beaty, 71 Okla. 275, 278-79, 177 P. 104, 106-07 (1918).

117. This situation assumes there are no express lease provisions to the contrary regarding offset wells, nor a provision for offset or compensatory royalties.

118. See supra notes 5 and 8.

119. See supra note 113.

120. As the Rogers court noted, the covenants are totally independent (i.e., the implied covenant
Second, the minority rule follows well-established oil and gas contract construction principles. Courts generally construe oil and gas leases so as to promote development. The primary goal of the parties to the lease is production, hopefully resulting in profit. A construction that permits the lessee to ignore the draining away of the subject matter of the contract frustrates the agreement's purpose. It is more consistent with the parties' intent to require the lessee to perform under the implied covenant to protect against drainage in spite of his payment of delay rentals. In an effort to make a construction argument, a number of majority rule cases have asserted that an express clause relating to the drilling of wells precludes the implied covenant to drill a protection well. These decisions have stated that the written provision contains the lessee's entire obligation with respect to drilling of any kind; therefore, no implied covenant to prevent drainage is recognized because it would conflict with an express lease provision. "Stanolind Oil & Gas Co. v. Christian" explains the tautology of this argument:

The implied covenant to drill offset wells for protection of the property from drainage is a distinct obligation from the obligation imposed by the implied covenant to develop the property. They are two separate and distinct covenants. The express stipulation against, or the full performance of, the obligation of the lessee to develop the property will not relieve the obligation to protect against drainage.

Other courts have reached the same conclusion. Third, the evolution of the oil and gas lease supports the minority theory of the independence of the exploratory and protection obligations. Scholars teach that the delay rental clause originally substituted for the implied covenant to drill an exploratory well but had no bearing to drill an exploratory well and the implied covenant to protect against drainage. Delay relates to development; the protection covenant relates to drainage. There is no reason to treat the implied covenant to protect against drainage as a modification of the development covenant. 55 OKLA. B.J. at 2127.

121. See e.g., Doss Oil Royalty Co. v. Texas Co., 192 Okla. 359, 137 P.2d 934 (1943).
123. See supra note 122.
124. 83 S.W.2d at 408.
125. Id. at 409.
127. See generally 5 H. WILLIAMS & C. MEYERS, supra note 5 (discussion of protection covenant's evolution).
on the implied covenant to protect against drainage.\textsuperscript{128} The weight of authority agrees.\textsuperscript{129} It is important to note, however, that those cases simply hold that the delay rental clause standing alone is compatible with the implied covenant to protect against drainage. The cases do not hold that a lessor can accept rentals and still maintain a suit for drainage.

Fraudulent drainage of the type in \textit{Rogers}, exacerbates the inequities of the majority rule. Under the majority rule, if a lessee holds adjacent leases and can efficiently drain the entire formation with a single strategically placed well, he has absolutely no incentive to incur the expense of drilling a protection well on the adjacent tract. Furthermore, he is under no obligation to compensate the lessor of the adjacent property for the minerals drained. The majority rule leaves the lessor without recourse because, so long as the lessee has paid delay rentals, he has not breached the lease. Clearly, the \textit{Rogers} rule creates a more equitable result: the implied covenant to protect against drainage is an overriding obligation that endures regardless of the manner in which minerals are affected.\textsuperscript{130}

Payment of delay rentals or even actual production have no effect on the implied covenant to protect against drainage; the duty to offset the draining well remains. Even actual production in tremendous volumes from a non-offset well does not discharge the duty to protect against drainage.

For several reasons, the more sensible rule is to confine the palliative operation of delay rentals to the implied covenant to drill an exploratory well. Age alone cannot justify adherence to the majority rule; a rule which defeats the parties' expectations, contradicts oil and gas contract construction, and disregards history. Oklahoma should have renounced the majority rule long ago, especially in cases of fraudulent drainage as in \textit{Carter} and \textit{Rogers}.

\section{V. Conclusion}

The \textit{Rogers} court ended Oklahoma's 66 year affair with the majority rule that the lessor's acceptance of delay rental payments bars his action for breach of the implied covenant to protect against drainage. The court rejected the opportunity to decide \textit{Rogers} on narrow factual distinctions. It proceeded to overrule two of its prior decisions and to separate the covenant to develop, which the payment of delay rentals may satisfy temporarily, from the implied covenant to protect against drainage, which

\begin{itemize}
\item \textsuperscript{128} Id. § 811.
\item \textsuperscript{129} See supra note 15.
\item \textsuperscript{130} 55 OKLA. B.J. at 2124.
\end{itemize}
the payment of delay rentals can never satisfy. The decision accords with the historical development of the oil and gas lease and fosters the lessee's and lessor's mutual goal of production from the lease.

_Cynthia LeMay_