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Points of Interest:

- Leasing to the State

THE PERILS OF LEASING SPACE TO THE STATE OF TEXAS

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On February 1, 2001, the Texas Supreme Court issued its decision in *General Servs. Comm'n v. Little-Tex Insulation Co., Inc.* (39 S.W.3d 591 (Tex.2001)) declining to adopt a waiver-by-conduct exception to the rule of sovereign immunity from suit. These decisions are of particular importance to owners of real estate contemplating leases with state agencies.

When the State or a state agency contracts with a private party, it waives its sovereign immunity from liability, but not its sovereign immunity from suit. In other words, although the State is liable for its breach of contract, it may not be sued for its breach of contract.

In 1995, the Texas Supreme Court issued an opinion that suggested that the State could waive its sovereign immunity from suit, through its conduct in accepting the benefits of the contract with the private party. Several Texas Courts of Appeal developed this theory into the "waiver-by-conduct" exception to the rule of sovereign immunity from suit. As long as the State had received the benefit of the private party's performance under the contract, the State could not assert sovereign immunity against a suit by the private party brought to compel performance of the contract by the State.

The Texas Supreme Court's decision in February of 2001 eliminated the



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waiver-by-conduct exception. As a result of this recent decision, the State, as a tenant under a real property lease, can breach the lease by failing to pay rent, but the landlord is barred from exercising its right to terminate the lease and recover possession of the leased space. A landlord's only recourse is to obtain legislative permission to proceed with its suit against the State. The likelihood of obtaining legislative permission is speculative at best. Both a Senate and House member must sponsor the bill. Also, suits to recover rent from the State appear to be more favored by state legislators than suits to terminate a lease and recover possession.

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