

**MEMORANDUM****TO:** Paul Rakowski**FROM:** David D. Queen**RE:** "Dumpster Diving"**DATE:** April 2, 1998**FILE:** N/A**CC:** Vezeris

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I have looked over the materials Tim Ward found regarding "dumpster diving" – the practice of examining seemingly abandoned trash on behalf of a competitor. I am sufficiently concerned about the risks to BBI that I recommend we retain counsel to give us an opinion letter on the legality of the practice in each of the states where we currently do such reviews or where we expect to do them.

An assumption seems to have developed that anything placed in a trash bag or dumpster is fair game so long as the party generating the trash has abandoned it and thus ceased to have an expectation of privacy in the trash. That notion is grounded almost entirely in criminal search and seizure law involving the Fourth Amendment – hence the reliance on the "expectation of privacy" language in those cases. When the searching party is an agent/officer, the only issue of interest to the court is whether the items searched were abandoned by the owner. Therefore, there was no issue of trespass to be dealt with. Federal law on this subject was set out in California v. Greenwood, a case in which the trash was left "outside the curtilage of the home" and was only searched by the police after it was picked up by the trash collection service and turned over to the police. The Court concluded that the original owner of the trash had abandoned the trash "in an area particularly suited for public inspection."

In some instances targets of dumpster searches are leaving their trash in a dumpster (probably owned by a private trash service) on the target's property. The efforts to secure the dumpsters varies from target to target and even from day to day with a single target. For example, some of the dumpsters merely sit in a parking lot, accessible to anyone willing to open their lids. Other times, the dumpsters are surrounded by a fence (sometimes locked, sometimes not). These fences are likely

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intended to prevent others from dumping their own trash rather than to protect the trash from prying eyes. Regardless of the intent of the party leaving the trash in the dumpster, if the trash is searched prior to pick up by the trash service, the search raises some troublesome issues. First, is a state trespass law violated by entering private property in order to get to the dumpster? Second, is the search a possible violation of trade secret laws?

The first question requires a state-by-state search of the applicable laws on trespass. The second issue is even more complicated. For example, one federal court has said the non-police searches under trade secret standards will be influenced by whether the trash was searched in an area "generally accessible to others or exclusively under [the owner's] ownership and control." The court said it would be important "how the trash was stored, where it was placed and what other precautionary measures" were taken. Further, California state courts have expressly ruled that searching trash is prohibited until the trash has "lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere." Connecticut recently passed a state statute forbidding trash searching as a form of espionage. Congress passed an economic espionage statute last year not directed at dumpster diving per se, but prohibiting the theft of any economic information provided the owner took "reasonable" measures to safeguard it. Violation of the statute carries a 15 year prison term and a \$10 million fine.

In other words, the issue is a very complicated one. If BBI expects to use this method of information gathering, it would be prudent to get the opinion of outside counsel which could be relied upon by BBI should there be future litigation directed against BBI. I can, of course, do research on the issue. However, if BBI is sued or charged with a crime based on this practice, my opinion (in a capacity as an employee) will have limited value. On the other hand, outside counsel's opinion could potentially permit assertion of the so-called advice of counsel defense which can completely defeat allegations of wrongdoing.