

**NAPBS 2010 ANNUAL CONFERENCE**

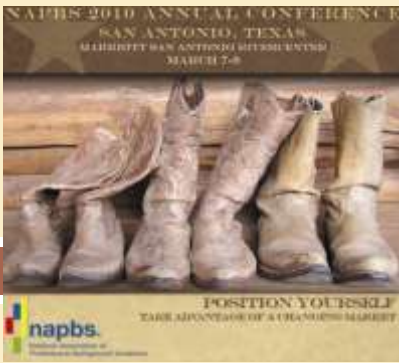
**SAN ANTONIO, TEXAS  
MARRIOTT SAN ANTONIO RIVERCENTER  
MARCH 7-9**



**ADVANCED FCRA AND STATE  
LAW: COMPLEX ISSUES LIKELY  
AT THE FOREFRONT OF  
LITIGATION IN NEXT 5 YEARS**

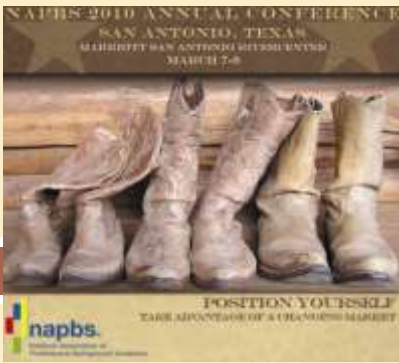
**Pamela Q. Devata  
Partner  
Seyfarth Shaw LLP**

**POSITION YOURSELF  
TAKE ADVANTAGE OF A CHANGING MARKET**



# Agenda

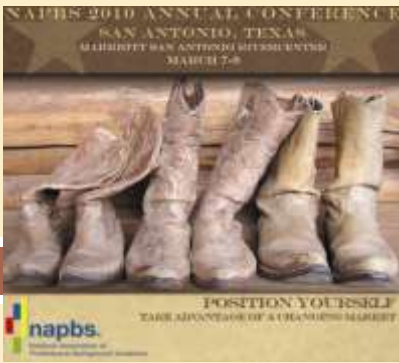
- Brief Recap of FCRA Basics
- Complex Areas Likely To Produce Significant Litigation In the Next 5 Years



# Recap of Basics

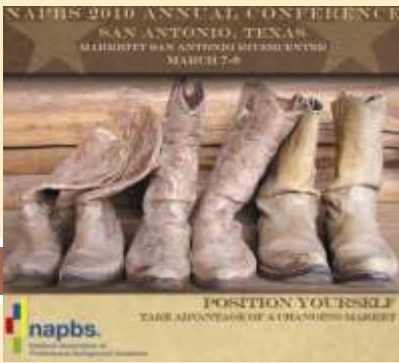
A CRA has 3 prime areas of responsibility under the FCRA:

- Compliance procedures;
  - Section 605-what is in a consumer report;
  - Section 607-reasonable procedures to assure “maximum possible accuracy”;
  - Section 613-notice to the consumer or strict procedures when dealing with adverse public record information for employment purposes;
- Disclosures to end-users and consumers;  
and,
- Dispute resolution



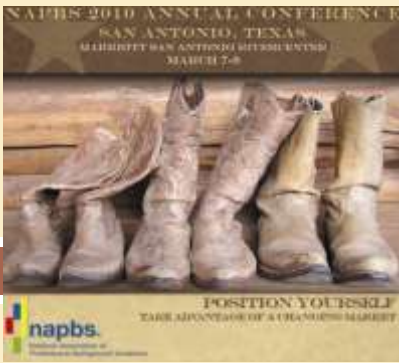
# Litigation Risk # 1: Section 613 of the FCRA

- Section 613: “At the time” notice or strict procedures
  - Misperception that this only applies to “criminal” records.
  - Applies to all “public records”
  - Does only apply to employment purposes only
  - Strict procedures to ensure the information is “complete and up to date”



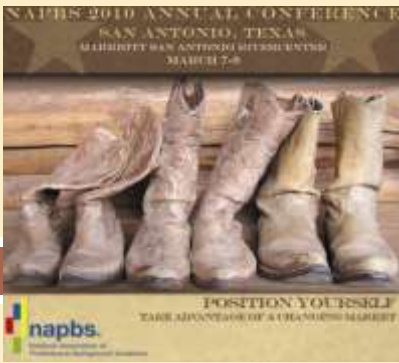
# Litigation Risk #2: Applying Correct Time Limitation To Tricky Criminal Histories

- Section 605 restricts what type of information CRAs can report.
- Convictions and arrests are easy, but be aware of catch all “any other adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years”
  - i.e., deferred adjudications, pending, warrants
- State laws differ and have salary requirements
- Preemption issues



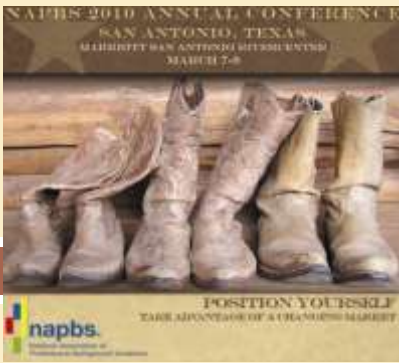
# Litigation Risk #3: California Cover Sheet

- Recent influx of class actions claiming first page of consumer reports in California not adequate
- Tips:
  - 12 point bold font
  - Spanish/English
  - First Page
  - No Case law interpreting the issue as of yet
  - Damages are \$10,000/violation (potentially)



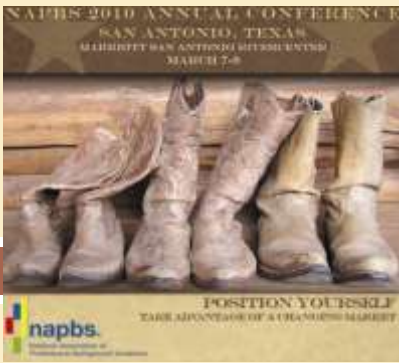
# California Cover Sheet

- An investigative consumer reporting agency shall provide the following notices on the first page of an investigative consumer report:
  - (a) A notice in at least 12-point boldface type setting forth that the report does not guarantee the accuracy or truthfulness of the information as to the subject of the investigation, but only that it is accurately copied from public records, and information generated as a result of identity theft, including evidence of criminal activity, may be inaccurately associated with the consumer who is the subject of the report.
  - (b) An investigative consumer reporting agency shall provide a consumer seeking to obtain a copy of a report or making a request to review a file, a written notice in simple, plain English and Spanish setting forth the terms and conditions of his or her right to receive all disclosures, as provided in Section 1786.26.
  - Cal. Civ. Code 1786.29



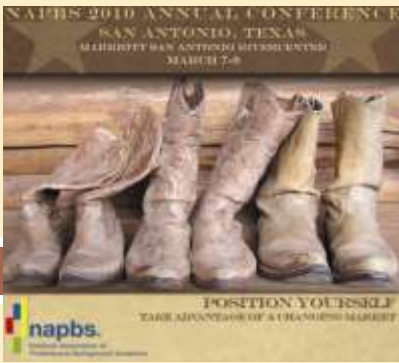
# Litigation Risk # 4: Adjudication

- Be cautious of adjudication/grading models
  - EEOC and attorney generals are targeting CRAs and Employers
  - Recent AG opinion against CRA
  - Requesting records
  - Protect yourself contractually
    - Indemnification language
    - Don't create or give guidance on hiring criteria models



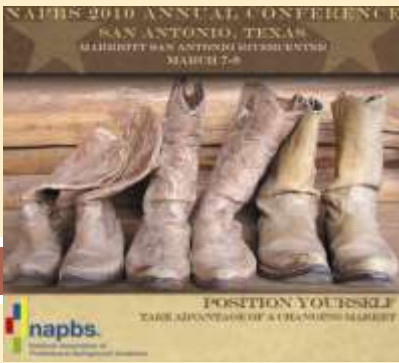
# Adjudication (con't)

- E-RACE=Eradicating Racism and Colorism from Employment
- The EEOC is in the process of identifying “issues, criteria and barriers” that contribute to race and color discrimination in the workplace
- Part of these effort involves reviewing pre-hire processes and other selection and testing criteria



# Adjudication (con't)

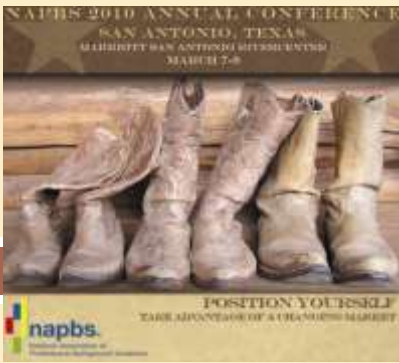
- EEOC's argument/Attorney General Argument
- Certain information has a “disparate impact” on minority groups
  - Specifically: Arrest records and credit information
- Argument is that people of certain races and national origins are arrested more frequently than others outside of those groups and/or have negative credit information; thus, employers using the



# Adjudication (con't)

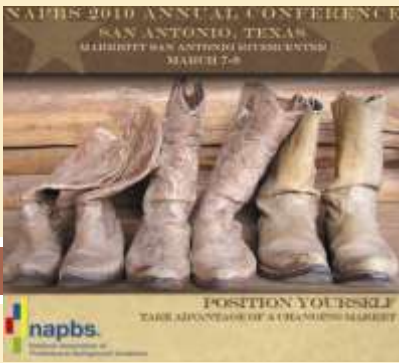
- Credit Reports
  - WA, HI, many states pending (Oregon)
- “Job relatedness” requirements for criminal history:
  - WI
  - NY (Recent AG opinion)
  - PA
  - HI
  - MO
  - KS
  - Puerto Rico via case law only
- Key is to instruct your clients to obtain their own counsel and NOT rely on your guidance.





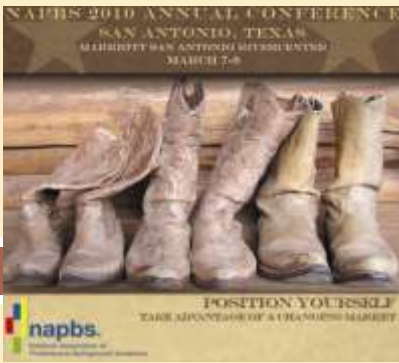
# Litigation Risk #6: Uncompleted/Pending Reports

- Consider how you address “pending” national criminal database follow-up checks in reports.
- “Pending” vs. “In progress”
- Many clients will take action based on “pending” information.
- Disclaimers are imperfect.
- Best to use language suggesting nothing has been processed yet.



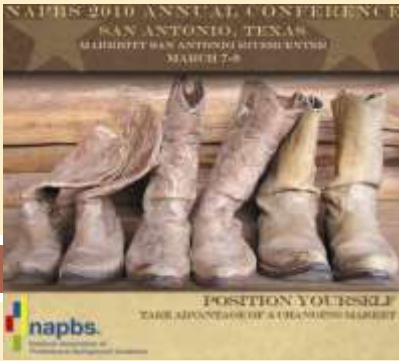
# Litigation Risk #7: Duty to Furnishers

- CRAS often concerned with disclosing the name of their client to a third party
- Resellers have obligation to provide the name of end-user to CRA and the permissible purpose. 15 U.S.C. Sec. 1681e(e)(1).
- Usually occurs with credit bureaus and other vendors.
- Recent cases filed alleging failure to provide end user and/or permissible



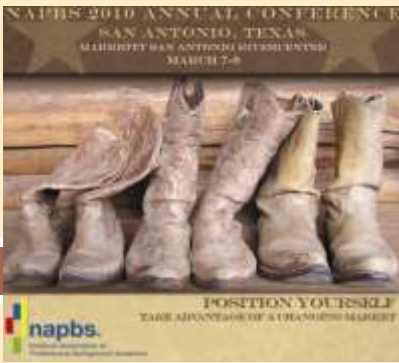
# Litigation Risk #8: Duty To Users

- *Talx* Settlement \$350,000: FTC states must provide FTC's "Notice to Users."  
<http://ftc.gov/opa/2009/07/talx.shtm>
- Have contracts state that the User received a copy of the Notice and the Summary or Rights.
- Provide in client sign-up documentation and make available online



# Litigation Risk #9: Name-Match Only Reports

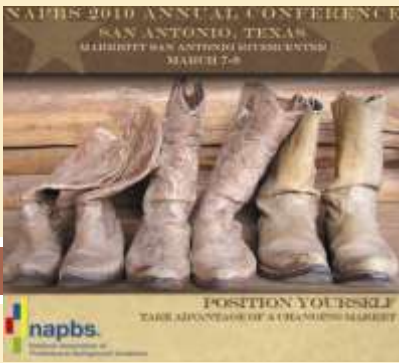
- Question of whether name only constitutes “reasonable procedures to ensure maximum possible accuracy” under Section 607
- At best, will be question for jury.
- Disclaimers may not work—because the burden is still on the CRA and you can’t “pass the buck”.
- Tip: Before reporting name match, pull the underlying court file to see if any further information.
- [Wilson v. Rental Research Servs., 175 F.3d 642 \(8th Cir. Minn. 1999\)](#) (subsequently vacated by split decision of 8th Circuit) (overturning SJ and stating whether name match was reasonable is a question for the jury even where disclaimer remained).



# Litigation Risk # 10: Identity Theft Laws

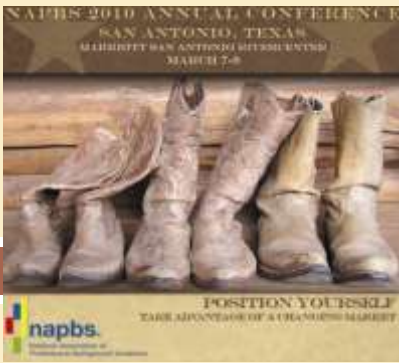
- CRAs have obligations under FCRA's identity theft provisions
  - If consumer contacts CRA about possible identity theft (or fraud or related crimes), the CRA must:
    - 1) provide information on how to contact FTC;
    - 2) provide information on how to contact credit bureaus to obtain information on "fraud alerts."

15 U.S.C. Sec. 1681c-1(g)



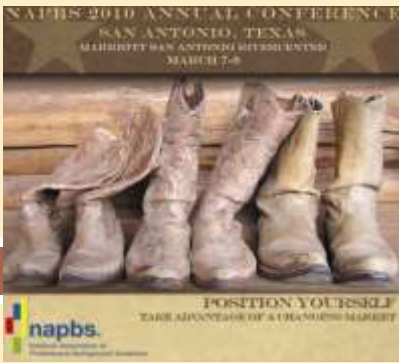
# Identity Theft Laws

- When Must A CRA Block Information From Reporting?
  - Consumer proves his or her identity
  - CRA receives copy of identity theft report (local, state, or federal government)
  - Consumer identifies specific pieces of information as resulting from identity theft
  - Consumer provides statement that information does not relate to any transaction by the consumer
- A CRA must block the information within 4 days of receiving the report



# Identity Theft Laws

- What Must CRAs Do To Block Information?
  - Not report any information that meets the criteria discussed previously
    - This means that CRAs must have a system in place to prevent the information from being reported
  - Notify furnisher of information that the information may be the result of identity theft, a report has been filed, a block has been requested, and the effective dates of the block

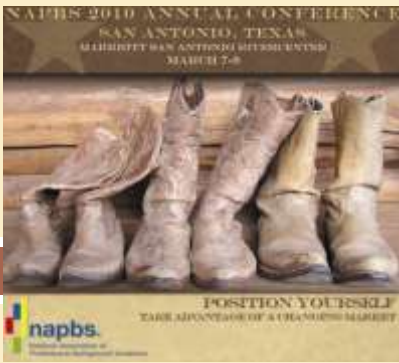


# Identity Theft Laws

- Note that “blocking” provisions do not apply to resellers so long as:
  - not handling consumer’s alleged “identity theft information” at time of consumer request
  - they inform consumer that he/she may report identity theft to FTC

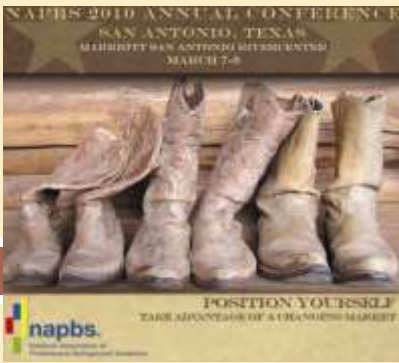
BUT

Check with Credit bureaus to see what their procedures are.



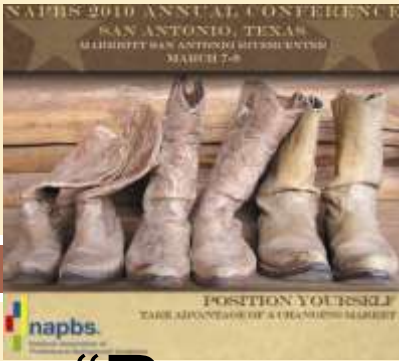
# Litigation Risk # 11: Document Disposal

- FTC implemented requirements regarding the proper disposal of confidential consumer information.
- FACT Act requires covered entities to take “reasonable measures” to keep “consumer information” out of the hands of those who are not authorized to see or use it.
- The law includes consumer information (or a compilation) in paper, electronic or other forms, but only if it is part of a consumer report or derived from a consumer report, as those terms are defined by the FCRA.



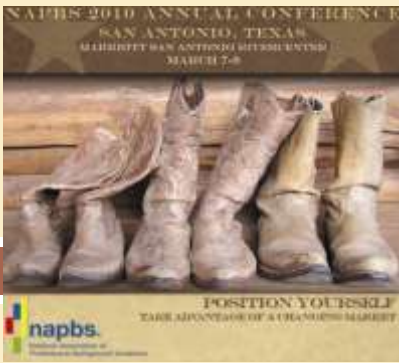
# Document Disposal

- Covers consumer information obtained about current employees, former employees, job applicants, customers and vendors through credit checks, background checks, or other business investigations, **as long as the information is in the form of a consumer report or derived from a consumer report.**
- All information must be disposed of in a way that reduces the chance it will be accessed by an unauthorized user.
- Excluded from the document destruction requirements is information that does not specifically identify a particular consumer.



# Document Disposal

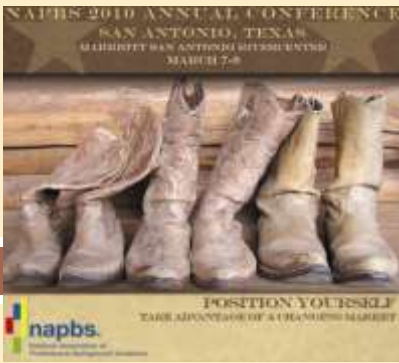
- “Reasonable measures” may differ depending on a company’s size, capabilities, and the amount of sensitive personal information it generates or obtains.
- All businesses should consider shredding such information before throwing it away, particularly if the garbage sits in an accessible area (such as a common trash room) for a period of time before being taken away.
- All companies should audit disposal practices.



# Litigation Risk # 12. Private Investigator Licenses

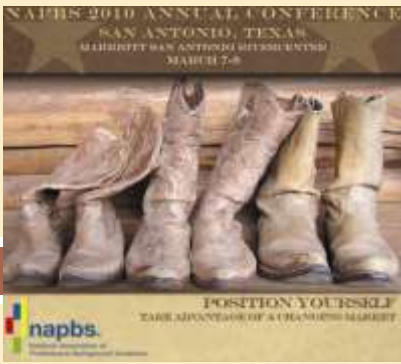
- Many states have broad definitions of what constitutes a private investigator—including compiling information about consumers.
- More states have prosecuted CRAs for failing to be licensed. (Nevada, Texas, Illinois, New Jersey, etc.)
- Some laws have exceptions for “pre-employment” generally, but you must read the law carefully.

- Illinois example



# Other areas

- Drug Tests may be deemed consumer reports
  - Federal Trade Commission, Islinger Op. Ltr. (June 9, 1998).
- Retention of records
  - No specific time limit in FCRA
  - Be aware of state laws and EEOC guidance
  - Statute of limitations under



**QUESTIONS?**