

like rosters and statistics, and in fact, allowed consumers to assume the identity of Keller and other players and compete in simulated football games. Furthermore, the court distinguished the facts here from prior cases involving the use of the names and statistics in fantasy baseball and football games that depend on the use of player names and statistics.⁹² The court noted, that in contrast, EA's game did not depend on current statistics regarding the players. Accordingly, the court denied EA's public interest defense.

The final defense asserted by EA was based on the California Civil Code § 3344(d) exemption, which provides a "public affairs exemption to the statutory right of publicity" and exempts from liability "a use of a name . . . or likeness in connection with any news, public affairs, or sports broadcast or account or any political campaign."⁹³ The court relied on the decision by the court in *Montana v. San Jose Mercury News, Inc.*⁹⁴ and construed section 3344(d) as exempting the factual reporting of matter that is considered as a "public affair." Neither EA nor Keller denied that college athletics are examples of public affairs; however, the court determined that EA's use of Keller's image and physical likeness in the video game extended beyond the factual reporting of information about him. Accordingly, the court rejected this defense.

California's Single-Publication Rule Applies to Common Law Right of Publicity and False Endorsement under the Lanham Act

In *Yeager v. Bowlin*,⁹⁵ retired General Charles "Chuck" Yeager—a well-known aviator—entered into an agreement with defendants Connie and Ed Bowlin, whereby defendants would sell certain Yeager memorabilia, including artwork signed by Yeager. Eventually, the parties disagreed over the number of prints Yeager was entitled to keep and Yeager demanded that his collection be returned and that any references to Yeager be removed from defendants' Web site. When defendants did not comply with Yeager's request, Yeager and his foundation filed suit for, *inter alia*, breach of contract, violation of California's statutory right of publicity, the common law right of privacy/right to control publicity and likeness, and false endorsement under the Lanham Act.

Defendants moved for summary judgment, arguing that Yeager's claims were time barred and Yeager failed to establish the existence of a written contract. Because there was no evidence of a written contract, the district court dismissed that claim. With respect to the statute of limitations argument, the district court found that the breach of oral contract claims under California law have a two-year statute of limitations and the breaches were known or should have been known to the plaintiffs between 2000 or at the latest in 2004. Because the complaint was not filed until 2008, the district court dismissed plaintiffs' breach of contract claims. The district court also dismissed plaintiffs' fraud and unjust enrichment claims because they have a three-year statute of limitations and plaintiffs knew about the alleged fraud in late 2003.

With regards to the remaining claims, the district court noted that the statute of limitations for Yeager's right to privacy claims is two years, the statute of limitations for Yeager's

92. See, e.g., *C.B.C. Distrib. & Mktg v. Major League Baseball Advanced Media*, 505 F.3d 818, 820–21 (8th Cir. 2007).

93. *Keller*, 2010 WL 530108, at *7 (citing CAL. CIV. CODE § 3344(d)).

94. *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 793 (Cal. Ct. App. 1995).

95. No. 08-102, 2010 U.S. Dist. LEXIS 718 (E.D. Cal. Jan. 6, 2010).

statutory unfair competition claim is four years, and the statute of limitations for Yeager's false endorsement under the Lanham Act is either the two-year statute applicable to right of privacy claims or the three-year statute applicable to fraud claims.

Defendants argued that the privacy, statutory right of publicity, and false endorsement claims were barred based on the single publication rule. The single publication rule states that "[n]o person shall have more than one cause of action for damages for . . . invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture."⁹⁶ Furthermore, "[u]nder the single publication rule, with respect to the statute of limitations, publication generally is said to occur on the 'first general distribution of the publication to the public'"⁹⁷ and the statute of limitations begins to run regardless of whether plaintiffs had the publication or knew of its existence.

Yeager argued that the single publication rule is inapplicable because defendants, as Web site sellers, were continuously offering for sale and selling the products at issue in this litigation. Thus, the statute of limitations should restart for each sale. Yeager also argued that the statute of limitations should be equitably tolled due to defendants' improper conduct.

The district court rejected Yeager's equitable tolling argument because plaintiffs retained legal counsel in 2005 and "equitable tolling ceases once a claimant retains counsel because the claimant 'has gained the means of knowledge of her rights and can be charged with constructive knowledge of the law's requirements.'"⁹⁸ Equitable tolling was also not available to Yeager because he failed to demonstrate that defendants actively induced Yeager to delay suing before the statute of limitations period expired.

The district court also rejected Yeager's argument that the single-publication rule was inapplicable to the defendants' Web site. The court noted that such a position would effectively eliminate the single-publication rule because the statute of limitations would never run so long as the Web site remained operational with items for sale. The court further noted that California courts have explicitly found that the repeated sale of identical products is subject to the single-publication rule, and that the defendants' Web site displayed the identical content to all of its viewers.

The court concluded that the defendants' Web site constituted a "single integrated publication" for purposes of the rule,⁹⁹ that Yeager's claims were based on material that had been posted on the defendants' Web site since 2000, and that, accordingly, his claims, which were filed in 2008, were time barred.

The court noted that the single-publication rule may not apply when a party republishes information, but that the defendants' revisions to their site in 2003 to include new information about Yeager did not change the result because Yeager's claims were still time-barred by 2008.

Finally, the district court held that, even if the single-publication rule did not apply, the plaintiffs' privacy claims were time barred because more than two years passed between Yeager's notice of the alleged violations in 2005 and the 2008 filing of suit.

96. *Id.* (citing CAL. CIV. CODE § 3425.3).

97. *Id.* (citing *Shively v. Bozanich*, 31 Cal. 4th 1230, 1245 (2003)).

98. *Id.* (citing *Leorna v. U.S. Dep't of State*, 105 F.3d 548, 551 (9th Cir. 1997)).

99. *Id.*