

## Standards for Antitrust Injunctive Classes: Applying *eBay* to Antitrust Injunction-only Classes

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In recent years, the Supreme Court has made it increasingly difficult for plaintiffs to certify antitrust damages classes under Rule 23 of the Federal Rule of Civil Procedure.<sup>1</sup> Those roadblocks have resulted in an increasing number of injunction-only classes certified in antitrust cases.<sup>2</sup> Traditionally, injunctive class plaintiffs have had a relatively easy road once they proved an antitrust violation. Indeed, in *United States v. Oregon State Med. Soc.*, 343 U.S. 326, 333 (1952), the Supreme Court held that “all it takes” for injunctive relief in an antitrust case, is for the plaintiff to show “a real threat of future violation or a contemporary violation” that is “likely to continue or recur.”<sup>3</sup> But under the traditional principles of equity, injunctive relief should be more, not less, difficult to obtain than damages. The Supreme Court recognized as much in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

In *eBay*, the Supreme Court established that courts must apply the traditional principles of equity to any injunction sought, absent a clear statutory indication that Congress intended to depart from those principles.<sup>4</sup> In other words, the Supreme Court overruled the *Oregon* line of cases by implication, thereby inviting antitrust defendants to argue that the requested injunctive relief is inappropriate under the more-demanding traditional principles of equity. Those “well-established principles of equity” mandate that an injunction should be used sparingly and only when necessary to avoid immediate irreparable harm, when monetary relief is not adequate, when the balance of the hardships favors the moving party, and when the public interest would not be harmed by a permanent injunction.<sup>5</sup>

### The Four-Factor *eBay* Applies to All Injunctions Unless the Statute Says Otherwise

In *eBay*, the Supreme Court reviewed the Federal Circuit’s “general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances.” 547 U.S. at 391. As the starting point of its analysis, the Court recognized:

[a]ccording to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

*Id.* Moreover, the Court reaffirmed that “a major departure from the long tradition of equity practice should not be lightly implied.”<sup>6</sup> Significantly, the Court cited two cases for the four-factor equitable test that involved injunctions for statutory violations unrelated to intellectual property.<sup>7</sup> The Court held that “nothing in the Patent Act indicates that

1 See *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) (applying the “rigorous analysis” standard to Rule 23(b)’s predominance requirement); See also *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2306 (2013) (holding that the Federal Arbitration Act’s mandate in favor of arbitration was not overcome because arbitrating a federal antitrust claim on an individual basis would be cost prohibitive); see also *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011) (reaffirming that trial courts must conduct a “rigorous analysis” to determine whether a putative class meets Rule 23(a)’s commonality requirement).

2 In re *NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-1967 CW, 2013 WL 5979327, at \*10 (N.D. Cal. Nov. 8, 2013); see also In re *Am. Express Anti-Steering Rules Antitrust Litig.*(II), 1:13-cv-07355-NGG-RER, Dkt. 141 (E.D.N.Y. Feb. 11, 2014) (settlement class included 23(b)(2) class only because arbitration clause barred damages class action).

3 See also *Zenith Radio Corp.*, 395 U.S. at 130 (holding that private plaintiffs “need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur”).

4 *Id.* at 391-92 (holding “nothing in the Patent Act indicates that Congress intended” a departure from the tradition of equity).

5 *Id.* at 391.

6 *Id.* (internal quotations and citations omitted).

7 *Id.* (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–13 (1982) and *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987)).

Congress intended” a departure from the tradition of equity; the relevant language stated that an injunction “‘may’ issue only ‘in accordance with the principles of equity[.]’” *eBay*, 547 U.S. at 391-92 (quoting 35 U.S.C. § 283).

Thus, the upshot of *eBay* is that courts must apply the traditional principles of equity when a plaintiff seeks an injunction under any statute, unless the relevant statute indicates that Congress intended a departure from those principles.<sup>8</sup>

## The *eBay* Factors Apply to Injunctions Sought Under Section 16 of the Clayton Act

Section 16 of the Clayton Act provides that any person shall be entitled injunctive relief from a violation of the antitrust laws “when and under the same conditions and principles as injunctive relief . . . is granted by courts of equity[.]”<sup>9</sup> Compare that text with Section 283 of the Patent Act: courts “may grant injunctions in accordance with the principles of equity.” Just like the Patent Act, Section 16’s language does not indicate that Congress intended a departure from equitable principles.<sup>10</sup> The opposite is true: Section 16 explicitly mandates that courts may only issue antitrust injunctive relief under the same principles as applied by courts of equity.<sup>11</sup> Thus, the Supreme Court’s logic in *eBay* applies with equal force to antitrust injunctions. Accordingly, courts should require antitrust plaintiffs to satisfy traditional four-part equitable test for injunctions.

## Conflicting pre-*eBay* Supreme Court Precedent Has Been Overruled

On one hand, the Supreme Court has already stated that the traditional principles of equity apply when a private plaintiff seeks an injunction under Section 16.<sup>12</sup> On the other hand, the Court has interpreted Section 16’s language expansively, stating that a plaintiff must only show “a real threat of future violation or a contemporary violation” that is “likely to continue or recur.”<sup>13</sup> As a result, some courts have subsequently held that an antitrust plaintiff need not meet all of the requirements for an injunction imposed by traditional equity jurisprudence.<sup>14</sup>

But a straightforward reading of *eBay* shows that the Supreme Court implicitly overruled the *Oregon State Medical Society and Zenith* line of cases, intending for *eBay* to apply to injunctions generally. Indeed, after *eBay*, the Supreme Court has applied the four-factor equitable test to a permanent injunction sought under a statute unrelated to intellectual property.<sup>15</sup>

## The Trend for Trial Courts to Apply *eBay* to Antitrust Injunctions

Despite the somewhat murky pre-*eBay* case law on the proper standard for antitrust injunctions, a clear trend has emerged for trial courts to apply the *eBay* factors when assessing whether an antitrust plaintiff is entitled to injunctive relief.<sup>16</sup> Moreover, the Third Circuit has tacitly approved of the use of the four-factor *eBay* test to determine whether a permanent injunction should be granted to a private antitrust claimant.<sup>17</sup>

8 See *Salinger v. Colting*, 607 F.3d 68, 78 (2d Cir. 2010) (“[W]e see no reason that *eBay* would not apply with equal force to an injunction in any type of case.”); *SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285, 289 (2d Cir. 2014) (citing *Salinger* and holding that the four-factor *eBay* test applies to permanent injunctions for violations of the Securities Act of 1933); see also *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 755 (7th Cir. 2012) (holding that *eBay* governs a motion for a preliminary injunction in a copyright case); *Flexible Lifeline Systems, Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 995–96, 998 (9th Cir. 2011) (per curiam) (same).

9 15 U.S.C. § 26.

10 See *eBay*, 547 U.S. at 391.

11 15 U.S.C. § 26.

12 *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969) (stating that “§ 16 of the Clayton Act . . . invokes traditional principles of equity”); see also *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 464 (1921) (“[The Clayton Act] gives to private parties a right to relief by injunction . . . under the conditions and principles regulating the granting of such relief by courts of equity”).

13 *United States v. Oregon State Med. Soc.*, 343 U.S. 326, 333 (1952); *Zenith Radio Corp.*, 395 U.S. at 130.

14 *Wilks v. Am. Med. Ass’n*, 671 F. Supp. 1465, 1484 (N.D. Ill. 1987) aff’d, 895 F.2d 352 (7th Cir. 1990).

15 See *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010) (stating that the *eBay* factors apply to permanent injunctions sought to remedy a NEPA violation).

16 See *Avaya Inc. v. Telecom Labs, Inc.*, 2014 WL 2940455, at \*3 (D.N.J. June 30, 2014) (holding that it is “clear that the more restrictive four-factor [*eBay*] test is necessary” in antitrust cases); *ZF Meritor LLC v. Eaton Corp.*, 800 F. Supp. 2d 633, 637-38 (D. Del. 2011) rev’d in part, vacated in part on other grounds, 696 F.3d 254 (3d Cir. 2012) (without citing *eBay*, court applied similar four-factor equitable test to determine whether Sherman Act

## Conclusion

Courts must analyze the *eBay* factors before granting a permanent injunction in an antitrust case. Antitrust defendants should develop the case record in order to exploit those factors — including whether plaintiff has suffered irreparable harm and that money damages are an inadequate remedy — because they could serve as an effective line of defense against antitrust plaintiffs who have already proved an antitrust violation.

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plaintiff was entitled to a permanent injunction); *In re Vitamin C Antitrust Litig.*, 2013 WL 6191945, at \*5 (E.D.N.Y. Nov. 26, 2013) (applying *eBay* factors after the parties agreed that the four-part *eBay* test applied to injunctions under Section 16 of the Clayton Act); *Rochester Drug Co-Operative, Inc. v. Braintree Labs.*, 796 F. Supp. 2d 560, 565 (D. Del. 2011) (holding that traditional rules of equity apply to requests for preliminary injunction in an antitrust action arising out of a patent infringement case); but see *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 2014 WL 3899815 (N.D. Cal. Aug. 8, 2014) (“The Sherman Act itself gives district courts the authority to enjoin violations of its provisions and does not impose any additional requirements on plaintiffs who successfully establish the existence of an unreasonable restraint of trade”).

17 *Avaya Inc. v. Telecom Labs, Inc.*, 2014 WL 2940455, at \*4 (citing *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 300-03 (3d Cir. 2012) cert. denied, 133 S. Ct. 2025 (2013)).