

NATIONAL SPORTS LAW

NEGOTIATION COMPETITION 2023

ROUND ONE

“In a Pickle”

GENERAL FACTS FOR BOTH TEAMS

Inarguably, one of the fastest growing sports in the world is Pickleball. First played in 1965 in Banbridge Island, Washington, and apparently (stories differ) named after the family dog “Pickles,” Pickleball is something of a hybrid between tennis, ping pong, and badminton, played on a smaller version of a tennis court with wiffleball-like balls and tennis-like play and scoring.

At the start of the sport’s meteoric rise to popularity, Pickleball had a very distinct group of core participants: seniors—specifically those older than age 65—who sought a sport to help them keep active without the strain of traditional tennis or badminton. However, Pickleball took off even further during the COVID-19 pandemic, as the sport similarly allowed people of all ages in quarantine environments to keep active without needing a large amount of physical space. With more people trying the sport, more people have enjoyed it, and the sports industry has responded; hotel chains like Marriott and Omni are converting some of their tennis courts to pickleball courts at some of their resort hotels, and a restaurant chain called Chicken N’ Pickle that started with four locations in Kansas, Oklahoma, Missouri, and Texas has additional locations planned for 2024 openings in Colorado, Arizona, Nevada, and Indiana as well.

Of course, those who enjoy pickleball as a sport are not all satisfied with the chance to play the game, but also enjoy watching the best of the best play against each other in competition. A professional pickleball league, Major League Pickleball (MLP), was founded in 2021, featuring eight teams. The league added another four teams in 2022 and another four teams in 2023, with new teams purchased by a number of high-profile sports figures like Tom Brady, Patrick Mahomes, Naomi Osaka, LeBron James, and Kevin Durant. By May 2023, the league had reached a deal with Disney to broadcast the Season One and Season Two Premier Level Super Finals on ESPN2 on June 19, 2023, and December 12, 2023, respectively.

But with every new phenomenon comes its critics and counter-phenomenon. Pickleball has had its fair share of nonbelievers, particularly among younger audiences who do not understand the appeal, the sport’s rapid growth, or how the sport differs from the others it is loosely based on. Any news story discussing the rapid growth of the activity is met with derisive comments or even anger at the rapid proliferation of pickleball-specific courts around the country, and a simple search of the word “pickleball” on social media of all flavors will find various memes poking fun at the sport.

One major reason why many dislike pickleball as a sport is the noise that the sport produces. Unlike tennis, which uses a soft, felt-covered ball and a racket made up of crossed wires, hitting a hard-lined whiffleball with a much harder and solid pickleball racket is loud—up to 25 decibels louder than even the hardest-swung tennis serve—and distressfully annoying to many. A March 2022 article in the *Los Angeles Times*¹ detailed much of the backlash to pickleball among communities across the country, noting lawsuits filed in California and South Carolina claiming noise-related tort liability.

The Marine Bluff community is among the various communities where pickleball noise has created conflict between residents. Marine Bluff—a gated community located in North County San Diego a few short miles away from the Pacific Ocean—welcomes residents of all ages. However—in part due to the location and corresponding higher property prices—most of the community’s residents happen to be wealthy retirees: a demographic that has been particularly attracted to pickleball. In the summer of 2022, the Marine Bluff Homeowner’s Association (HOA) was approached by a group of residents asking whether they would consider converting some or all of the community’s four tennis courts into pickleball courts, or at least allow residents to play pickleball on the courts during some or all hours of the day.

In response, the Marine Bluff HOA decided to allow pickleball play for a 90-day test period while soliciting feedback from residents. After this 90-day test period proved to be a success, the Marine Bluff HOA began allowing pickleball play full time, fully converting two of the tennis courts to four full-time pickleball courts. Residents have largely been thrilled with the HOA’s actions in this regard, and the pickleball courts have been immensely popular; signing up for pickleball on the two courts has generally required signing up at least one week in advance,

¹ Connor Sheets, *Pickleball Noise is Fueling Neighborhood Drama from Coast to Coast*, LOS ANGELES TIMES (Mar. 3, 2022), <https://www.latimes.com/california/story/2022-03-03/pickleball-noise-fueling-neighborhood-drama>.

and the HOA even had to push back against residents who complained that they could not play pickleball on other two tennis courts did not allow pickleball play as well.

However, not every Marine Bluff resident is in favor of the proposal. Kay Johnson, a homeowner with property adjacent to the tennis courts, is a single mother with two teenage boys (Neal and Joe). Johnson has been a vocal opponent of allowing pickleball play on the tennis courts because of the noise that it has created around her property. She made several complaints to the HOA both during the 90-day test period and in the year following, but these complaints were met with little response from the HOA board. Compounding the problem is that Johnson, a widow and single mother, exclusively works from home: a consideration she received from her employer when her husband passed away in 2018 to help her be able to raise her young family.

Last month, Johnson filed a complaint in the Superior Court of California, County of San Diego against the Marine Bluff HOA alleging a breach of the HOA’s governing documents, a breach of fiduciary duty, and a nuisance tort.² She has asked the court for \$750,000.00 in general and special damages, punitive damages, and declaratory and injunctive relief forcing the HOA to prevent pickleball play on the community tennis courts.

Attorneys for Johnson and the HOA have agreed to meet to discuss settlement options in an effort to resolve the legal claim before litigation gets fully underway. While both Johnson and the HOA have been clear that they reserve the right to reject any settlement offer that does not meet their interests, both parties have given their representatives full authorization to be as creative as they can to try to find a solution that fits both sides’ needs.

² Please note that this fact pattern is based on real-life active litigation. However, a significant amount of information in this fact pattern (including—but not limited to—the names of the parties) has been changed or added for academic purposes and to protect the privacy of the real-life individuals and organizations involved. Additionally, per NSLNC Rules 6(a-d), while competition teams are permitted and encouraged to look outside of the fact pattern for additional *background* information, any outside information must not change any material fact within the fact pattern. Specific to this negotiation problem, please consider the real-life events that serve as a factual basis for this fact pattern to be entirely unrelated to the circumstances described herein. In other words, any facts about the real-life litigation should not be used to affect this negotiation problem in any material way.

SUPPLEMENTAL MATERIAL

Article XI, Section 4 of the Marine Bluff Covenants, Conditions, and Restrictions:

No noxious offensive activity shall be carried on upon the Covered Property, nor shall anything be done thereon which might be or become an annoyance or nuisance to occupants within the Covered Property, which shall in any way interfere with the rights of quiet enjoyment of occupants within the Covered Property...[and] No Owner or occupant shall engage in activity within the Covered Property which is in violation of any law, ordinance, statute, rule, or regulation of any local, county, state, or federal body.

Section III(B) of the Marine Bluff Homeowner's Association Rules and Regulations:

No loud or offensive activity or behavior shall be carried out in the common areas, nor shall anything be done in the common areas which might be or become an annoyance or nuisance to occupants of Marine Bluff or which might in any way interfere with the rights of quiet enjoyment of the occupants of Marine Bluff.

California Civil Code § 3479:

Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

CONFIDENTIAL FACTS FOR KAY JOHNSON

Kay Johnson moved into the San Diego-area Marine Bluff gated community with her young family (including her husband and the then-one-year-old Neal) in 2009. Seeing the community as a great place to raise a family, Kay was thrilled that she and her husband were able to afford a house in such a prestigious community; the 2008 market collapse certainly did not hurt matters. Since then, Kay and her husband had another child (Joe), built significant equity in their house, and embedded themselves into the neighborhood culture.

In particular, Kay loved the location of her house within the Marine Bluff community, as her house is located right next to the community's four tennis courts. Kay has taken full advantage of this benefit since moving into the community; her two sons grew up getting tennis lessons on these courts, and tennis has been a prominent bonding activity for the three of them ever since their father passed away in 2018.

However, this benefit turned destructive for Kay in 2022 when the community made the decision to convert two of the tennis courts into four pickleball courts. All of a sudden, the gentle *thwap-thwap-thwap* of tennis rackets against tennis balls that Kay loved to wake up to in the mornings was replaced by a much louder and much more strident *pop-pop-pop*. Kay has made a (perhaps unhealthy) habit out of tracking the noise levels during pickleball play and regularly finds that the *thwap-thwap-thwap* ranges between 71 and 88 decibels in her house—far more than the 50 decibels of ambient noise allowed under San Diego County law.³ Compounding the problem, pickleball proved to be immensely popular among Marine Bluff residents; while the tennis courts were only used a few times per day during the weekdays, the pickleball courts have been jam-packed, with residents often needing to wait a week or longer for court times upon signing up. For Kay, living in her house is now a waking nightmare.

Over the past year, Kay has tried nearly every non-litigation measure she can think of to try and resolve the issue. She fervently made complaints both during and after the HOA's 90-day trial period, but her complaints were clearly drowned out by feedback by other residents who thought only of their selfish desires to play the sport every once in a while. Keeping the windows closed during the day—an exasperating sacrifice, given the San Diego weather—made

³ See San Diego County Ordinance Title III, Division 6, Chapter 4, § 36.404, subdivision (a), available at https://codelibrary.amlegal.com/codes/san_diego/latest/sandiego_regs/0-0-0-76067.

no difference. She spent about \$25,000.00 of her own money hiring a noise consultant and trying to soundproof her home to absolutely no avail. She looked into going to the library during work hours or even trying to get back to an in-office role, but even if that would solve the problem (not so much, given that pickleball play is at its most fervent in the 5:00-8:00 PM time period) her employer—a customer support agency—has transitioned all of their employees to remote work and closed its office to save costs during and following the pandemic.

Kay has even explored moving out of her beloved home, but even that drastic step feels impossible. In mid-2022, Kay reached out to several real estate agents to see how she might do selling the house. But while on each occasion the real estate agent would express excitement about getting the chance to sell Kay's house, the moment the agents would come to see the property their moods would shift considerably. Each time, Kay was told that she would have to price her house significantly below market—likely under \$1 million—in order to find a buyer, all because of the pickleball noise. By contrast, the agents tell Kay that without the pickleball noise her house would be worth between \$1.3-1.4 million. Kay is confident that all of her neighbors would act the exact same way if they were in her shoes in light of this fact alone.

Furthermore, Kay still has halfway to go on her original 30-year mortgage and a fair amount of debt still remaining from her husband's end-of-life medical expenses.⁴ The remaining cash that she would have to spend after selling her house would lead to her having to either move out of expensive Southern California entirely—a prospect her children are firmly against—or to settle for a significant downgrade in lifestyle in a more unpleasant part of San Diego.

Given her own expenses in trying to combat the pickleball noise, the drop in her house's property value, and her own sheer pain and suffering, Kay feels that the \$750,000.00 she has requested in damages in her complaint is more than reasonable. Indeed, the actual damages may be more given the intangible effect that the noise has had on her family. Her two sons hate being at the house during pickleball hours and as a result spend far more time at friends' houses than they do at home when they can, and given her job responsibilities she does not have much time to travel with her family. Kay firmly feels that pickleball has not only driven her to the brink of sheer insanity, but has torn her already-fractured family apart.

Kay wishes now more than ever that her husband was still alive; he was always better at establishing good relations with their neighbors and mediating conflict than she has ever been on

⁴ Kay's husband did have a life insurance policy through his employer, but this money has long since been spent.

her own. She feels that her constant complaining must at this point seem shrill, and that fact just adds to her frustration. She truly did not want to have to resort to litigation, but she feels at this point that it is the only way that she will be adequately heard by an intransigent HOA.

For obvious reasons, Kay's preferred solution to this dilemma would be to simply have things go back to the way they were before: with pickleball banned completely and the tennis courts near her house going back to tennis-only courts. Kay knows that getting the HOA to agree to this option on their own is unlikely, but she also feels that they may see her lawsuit as perhaps leading to that solution anyway. A perfect compromise would be to simply build new pickleball courts elsewhere in the community and make the noise someone else's problem, but driving around the neighborhood she is stumped as to where the HOA can put any new courts. The HOA board might have their own ideas as to a potential new location—and Kay would certainly be willing to help them scout around—but that seems to Kay like an impossibility.

Another option would be to reduce the number of hours in which community residents are allowed to play pickleball. While her current work-from-home job makes all times of the day problematic, if the HOA would be willing to reduce pickleball time to within work hours—say, between 10 AM and 4 PM—Kay might be more motivated to look for a new job that takes her out of the house during those hours. Kay likes her current employer and would be sad to leave, but finding a new job would be worth it to solve this problem. The pickleball players are all older retirees anyway, meaning they are fine to play exclusively during those middle hours.

If the HOA is not willing to adjust the community's pickleball hours enough to meet Kay's needs (or even if they are), Kay feels that the only way her concerns can be successfully alleviated is for the HOA to spend—and spend significantly—on soundproofing the courts. This idea came from the noise consultant she hired back in mid-2022. According to the consultant, Kay soundproofing her house was never going to be enough; the HOA would need to spend out of their own pockets to soundproof the courts themselves in order to drive down the decibel levels of the games considerably. Kay promptly sent this report and recommendation to the HOA board once she received it, but received no reply. Kay hopes that the board will be more willing to listen to this recommendation now that they have a lawsuit staring them in the face.

Per the consultant, to get the noise from the courts under 50 decibels it would cost about \$75,000.00 per court. Kay knows that this is a significant chunk of money, but she also knows that the HOA has saved up a bunch of money from resident fees to remodel the new clubhouse

and pool area; the HOA might consider using this money to alleviate the noise concerns from the pickleball courts instead, and save the more cosmetic remodels for a later date.

Kay knows that there are cheaper soundproofing options than the top-of-the-line \$75,000.00 per court option, but she would be very hesitant about taking that sort of risk. Most soundproofing options, according to her consultant, can only knock off around 10-15 decibels from pickleball games—not enough to solve the issue. Moreover, these half measures might not work at all. Kay read about another area, the village of Ridgewood, NJ, that spent over \$20,000.00 on USA Pickleball’s recommended sound-proof fencing in 2021, only to be met with continued complaints well into 2022. Such an outcome, Kay feels, would only lead to more conflict between her, the HOA, and other residents.

One outcome that Kay wants to prevent entirely is the expansion of pickleball to the other two tennis courts. Kay knows that residents are clamoring for more pickleball time between the four courts, and she admits that she and her sons are basically the only residents who still use the tennis courts religiously. But converting one or both of the remaining tennis courts to a pickleball court—or even just allowing pickleball on those courts during certain hours—would make things far worse. Not only would that take away Kay and her son’s ability to play tennis—one of the few bonding activities they have left—but the tennis courts are the closer two courts of the four overall, and thus serve as a buffer between her house and the pickleball courts. The noise is bad enough that the buffer effect is almost entirely insignificant, but allowing pickleball on the closer courts would make her problems far, far worse. Kay may be willing to allow occasional (i.e., weekdays-only) pickleball play on a third court, but only if the HOA would be willing to commit to the full \$75,000.00 per court workup.

Finally, Kay wants to ensure that any settlement allows her to recoup the \$25,000.00 she has accrued from having to hire a noise consultant and soundproof her home. Furthermore, she would like the HOA to pay the \$50,000.00 that she has accrued in legal fees to file this lawsuit—a lawsuit that she firmly feels should have been entirely unnecessary. A perfect settlement for Kay would also include additional compensation to account for her and her family’s pain and suffering over the past year-plus, but she would be willing to drop that demand if the HOA can show that they are finally willing to work with her in good faith to entirely resolve these issues.

CONFIDENTIAL FACTS FOR THE MARINE BLUFF HOMEOWNER’S ASSOCIATION

The board members of the Marine Bluff Homeowner’s Association (HOA) are incredibly frustrated as to how these events came to pass. The process by which the HOA decided to convert the two tennis courts to pickleball courts was thorough, comprehensive, and careful enough to involve all interested parties. After a group of residents first brought the idea to convert the courts up to the HOA in the summer of 2022, the HOA board conducted a 90-day test period to see how residents felt about the HOA allowing pickleball on the tennis courts. The response was overwhelmingly positive. The Marine Bluff community is largely filled with older residents who—like many drawn to pickleball—can no longer play more physically intensive games like tennis, and those who have tried the sport have had a whole lot of fun.

The HOA did receive a few complaints during this time period, but almost all of them were from Johnson herself. Just about everyone else in the community was enthusiastic about pickleball. Based on this overwhelming support, the board felt comfortable with their decision to ignore the stray complaint that came from Ms. Johnson like clockwork every few months.

Indeed, many residents feel that the HOA did not go far enough; i.e., rather than merely converting two of the four tennis courts to pickleball courts, many want the HOA to convert all four to pickleball courts. And there is quite a bit of merit to that idea, as the pickleball-specific courts are nearly always full. On the other hand, before the conversation the tennis courts often went unoccupied on most days—aside from Ms. Johnson and her two sons, who would be on the court regularly. Some members of the HOA board suspect that Ms. Johnson’s complaints have more to do with the new lack of broadscale availability of the tennis courts rather than the noise.

At the end of the day, the HOA board is confident that they made the right decision for all of their homeowners, even if Ms. Johnson was individually harmed by the decision. After all while the HOA owes a fiduciary duty to its members—as Ms. Johnson noted in her lawsuit—the HOA board feels that means that the board owes a duty to *all* of its homeowners, and the record is clear that the homeowners as a whole overwhelmingly supported the pickleball plan.

At the same time, the HOA board would very much appreciate finding a way to settle the lawsuit before things get out of hand. They are concerned about what this lawsuit is doing to relations between various community members and Ms. Johnson and what may happen if those relations continue to be strained. Ms. Johnson was, quite frankly, never the most popular

resident in the community; her constant complaining about noise, traffic, and others' use of the tennis courts has caused many community members (including members of the board) to immediately prepare for the worst in the rare times she showed up to an HOA meeting. This uneasiness intensified significantly when she regrettably lost her husband in 2018 and transitioned to a work-from-home role—a role that many residents were not happy about given portions of the community covenants, conditions, and restrictions (CC&Rs) forbidding operating a business out of a community residence. Ms. Johnson's new role *technically* did not violate this rule, but her seeming insistence on the community being as quiet as possible during work hours drove many community residents—especially the many retiree residents—up the wall.

The board currently has about \$500,000.00 in the bank. While much of this money is reserved as a rainy-day fund for situations like this lawsuit, about \$400,000.00 is earmarked for community improvement projects that have not yet been started, including remodeling the community clubhouse, renovating the community pool, and resurfacing the clubhouse parking lot. Given that these updates to the common areas have been long-requested and long-needed, the HOA board is concerned about what would happen if they had to postpone these projects until that money could be raised again—especially if residents discover that Ms. Johnson was the reason for the HOA's suddenly-depleted funds.

The HOA also has both full general and directors and officers (D&O) insurance. These coverages could potentially be used to help solve the pickleball problem as well. Each insurance policy is worth up to \$500,000.00 in annual coverage and does cover certain settlements (i.e., is not limited to final rulings). However, the board is hesitant to rely on these insurance policies; it may be a struggle to get the insurance company to cover a potential settlement given the peculiar nature of this lawsuit, and the community may need that coverage for a more pressing issue down the line. Moreover, the D&O policy does not cover actions for proven cases of a breach of governing documents or breach of a fiduciary duty—two claims in Ms. Johnson's complaint.

The easiest solution to this dilemma by far would be to have Ms. Johnson and her family move to a different location—preferably elsewhere, but even if that location is still in the Marine Bluff community. While there are currently no vacant houses in Marine Bluff, given the popularity of pickleball the HOA board feels that they may be able to help broker a trade between Ms. Johnson and another resident who would enjoy having significantly closer access to the courts. The process would be complicated—as, after all, these residences are owned, not

rented—and unprecedented but the HOA is confident that the community’s CC&Rs would allow for such a maneuver. However, the board admits that they have not reached out to any resident as of yet; the idea that someone would want to switch homes is merely speculative.

If Ms. Johnson is willing to go this route, the HOA board would be thrilled to facilitate this arrangement and would devote the time and energy it would take to find a suitable trade partner for Ms. Johnson and would even be able to use some of their resources to help facilitate the move. Along these lines, the HOA would be willing to pay for Ms. Johnson’s moving expenses and pay the legal fees necessary to make the trade work. The board would be willing to make similar arrangements to help Ms. Johnson move out of the community, though they would not be willing or able to pay for Ms. Johnson’s legal fees in this situation.

If Ms. Johnson insists on staying where she is, the board may be able to work with her to try to mitigate the noise from the pickleball courts. The HOA board has researched some noise mitigation options specific to pickleball but has been met with little success in finding the best option. Unfortunately, soundproofing pickleball courts has proven both expensive and largely ineffective for other communities; the HOA board in their research found that the village of Ridgewood, NJ, spent over \$20,000.00 on USA Pickleball’s recommended sound-proof fencing in 2021, only to be met with continued complaints well into 2022. The HOA board also contacted an acoustics and noise control consulting firm that specializes in pickleball noise complaints but was met with a steep quote: \$25,000.00 for a full report, and likely an extra \$50,000.00 per court for the soundproofing barriers needed to adequately insulate the courts.

However, the HOA board will not be able to guarantee that a full soundproofing workup will be able to fully appease Ms. Johnson. While the HOA has found that these measures may be able to knock off around 15-20 decibels from pickleball games—a measure that, per experts, makes the noise seem to the naked ear like cutting the noise level in half—this does little to actually reduce the 71-88 decibel output regularly recorded by Ms. Johnson. As Ms. Johnson has cited in her complaint, the San Diego County average sound limit for residential areas is 50 decibels.⁵ According to the consulting firm, mitigation measures needed to get the pickleball noise below that mark may cost upwards of \$75,000.00 per court—if it is even possible at all.

⁵ See San Diego County Ordinance Title III, Division 6, Chapter 4, § 36.404, subdivision (a), available at https://codelibrary.amlegal.com/codes/san_diego/latest/sandiego_regs/0-0-0-76067.

If the HOA is going to invest that kind of money into mitigation measures, they would need assurances from Ms. Johnson that she will not complain if the mitigation does not completely work to her liking. Barring that, the HOA would certainly be willing to listen if Ms. Johnson is willing and able to put up the difference in money needed for the more complete mitigation package. But again, if that does not work to her liking, it is on her, not on the HOA.

Regardless, the HOA board is adamant that they will not be able to engage on the solution that Ms. Johnson will likely prefer: banning pickleball completely. The sport is far too popular among community residents; the board feels that if they were to take that step, residents would respond by replacing the board with those who would simply reverse that reversal. Even limiting the hours or days when pickleball can be played would be a challenge; many community residents are upset about the currently accepted pickleball hours—10 AM to 8 PM—wanting to be able to play in the earlier mornings and later evenings when it is not nearly as hot. Moreover, there is a significant waitlist for pickleball court reservations; decreasing the number of hours would just make that worse. And there is unfortunately no room throughout the rest of the community where the HOA can fit new pickleball-specific courts—not that building new courts is something the HOA has the money to do anyway.

Of course, that problem could be mitigated—but only if Ms. Johnson was willing to work with the HOA. The great irony is that the two tennis courts that were converted to pickleball courts were the two courts *furthest* away from Ms. Johnson; two additional tennis-only courts sit between Ms. Johnson and the new pickleball courts. The HOA could potentially solve both Ms. Johnson's problems and the problems of the pickleball players in the community by using one (or both) of those two tennis courts—which are infrequently used outside of Ms. Johnson herself—as a court where either tennis or pickleball could be used, depending on the time or day. It would cost a bit (\$10,000 per court) to convert a tennis court to a multipurpose and would require some politicking and additional compliance oversight on the part of the HOA to get the entire community on board, but that may allow the two sides to limit the number of hours per day that pickleball is available without upsetting other residents. Noise mitigation efforts would still have to be taken—and the HOA would want to ensure that the new court allows for more or equivalent pickleball time between all courts—but the HOA feels that they challenge will be getting Ms. Johnson on board; other residents will be much easier to please, so long as pickleball is still available to them as much as possible.