GIVE ME BACK MY TOY: ANALYZING HOW THE DECISION-MAKING STYLES OF THE PARTIES IN MGA ENTERTAINMENT v. MATTEL LED TO MISSED OPPORTUNITIES AND PROPOSING A SOLUTION THAT WOULD BRING PARTIES CLOSER TO SETTLEMENT

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I. INTRODUCTION

If Barbie could talk, what would her testimony be? The fifty-year old doll has finally faced the ultimate competition: the young and hip Bratz dolls. Bratz made their way onto the doll runway and are taking the nation by storm while Barbie can no longer walk the way she used to. Will old age take her down or will a few minor adjustments, a lawsuit, and, perhaps, some Botox be the cure to her problems?

Mattel Inc. (Mattel)[1] and MGA Entertainment (MGA)[2] became rivals when Mattel realized that the designer of the Bratz dolls had once worked for them. Mattel's revenue had dropped and they had found the perfect fix: a lawsuit. However, emotions and desperation were not the key to a successful lawsuit and both parties ended up in a whirlpool of trials where after some

[1] Mattel, Inc. is the company that owns the rights to Barbie. *See generally Mattel*, MATTEL, http://corporate.mattel.com/our-toys/ (last visited June 20, 2014). "The Mattel family of companies . . . is the worldwide leader in the design, manufacture[,] and marketing of toys and family products." *About Mattel*, MATTEL, http://news.mattel.com/content/default.aspx?NewsAreaId=29 (last visited Oct. 27, 2014). Mattel's brands include Barbie, Hot Wheels, Monster High, American Girl, Thomas & Friends, and Power Wheels. *Id.*

[2] MGA Entertainment, Inc. is the manufacturer of the Bratz dolls. *See generally MGA Entertainment*, MGAE, http://www.mgae.com (last visited June 20, 2014). "The company provides interactive dolls, electronic handheld games . . . girl's lifestyle products[,] and smart toys, including robots and interactive plush toys." *Company Overview of MGA Entertainment, Inc.*, BLOOMBERG BUS. WK., http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=4549146 (last visited Oct. 27, 2014).

disturbances and changes, they ended up in the same position they started in— except with a couple million dollars of debt and richer attorneys. The parties' decisions played a critical role in these lawsuits. Their skewed assessments of liability and their wrong predictions about trial outcomes caused them to engage in a war when all they needed to do was communicate with each other and resolve their disputes through alternative dispute resolution.

This note will analyze the decision-making challenges of MGA and Mattel as they travel through courts across Southern California trying to resolve a dispute that will never have a clear answer. Part II will provide background information of the parties and an overview of the litigation battle. Part III will analyze the parties' goals and decision-making challenges. Part IV will discuss how engaging in alternative dispute resolution would have mitigated the parties' harm and will propose a method for overcoming the psychological barriers that impede settlement. Lastly, Part V will conclude the case study.

II. BACKGROUND

In June 2001, MGA, a privately owned company in Southern California, debuted a line of dolls called "Bratz."[3] The CEO of the company is Isaac Larian, an Iranian immigrant.[4] The Bratz dolls were designed by Carter Bryant.[5] Before Bryant began working for MGA Entertainment, he worked in the "Barbie Collectibles" department for Mattel.[6] In 1998, when Bryant was on an eight-month break from Mattel and living with his parents in Missouri, he came up with the idea of the Bratz dolls.[7] In August

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[3] Margaret Talbot, *Little Hotties*, NEW AM. (Dec. 5, 2006), http://newamerica.net/node/7772.

[4] *Id.*

[5] Mattel, Inc. v. MGA Entm't, Inc., 616 F.3d 904, 907 (9th Cir. 2009).

[6] *Id.* Mattel, Inc. is a company that manufactures and markets a variety of toy products, including Barbie, Polly Pocket, Disney Classics, Hot Wheels, Toy Story, Fisher-Price brands, etc. *Global 2000 Leading Companies*, FORBES (May 2014), http://www.forbes.com/companies/mattel/.

[7] Andrea Chang, *Bratz Trial: Carter Bryant, Creator of the Saucy Dolls, Begins Testimony*, LA TIMES BLOGS (Jan. 27, 2011), http://latimesblogs.latimes.com/money_co/2011/01/bratz-trial-carter-bryant-testify.html; Christopher Palmeri, *Barbie v. Bratz: Toys on Trial*, BLOOMBERG (June 13, 2008), http://www.businessweek.com/stories/2008-06-13/barbie-v-dot-bratz-toys-on-trialbusinessweek-business-news-stock-market-and-financial-

2000, Bryant pitched the idea of the dolls to MGA.[8] When MGA accepted Bryant's idea of the dolls,[9] Bryant signed a consulting agreement with MGA and, on the same day, gave Mattel two weeks' notice and finally left Mattel on October 19, 2000.[10] Throughout this two-week period, Bryant worked with MGA to design the Bratz dolls, even creating a preliminary sculpt[11] of what they would look like.[12] These ideas eventually became the bases for "Bratz."[13] When Mattel learned of the secret project between Bryant and MGA, it sued both Bryant and MGA.[14] Bryant settled with Mattel, which left Bratz and Barbie to battle it out in a series of lawsuits.[15] The lawsuits were divided into two phases with Phase 1 dealing with the issue of ownership of the Bratz dolls and Phase 2 dealing with all the other issues.[16]

Mattel argued that it had the rights to the idea of the Bratz dolls and trademark ownership of the "Bratz" name.[17] It also made claims of copyright infringement.[18] The ownership issue dealt

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advice. Notably, he did not get the drawings of the dolls notarized until August 1999. Chang, *supra* note 7.

[8] *Mattel*, 616 F.3d at 907. When Bryant met with Isaac Larian, he brought in preliminary sketches of the dolls, a figurine "constructed out of a doll head from a Mattel bin, a Barbie body and Ken (Barbie's ex) boots." *Id.*

[9] *Id.* The agreement was signed on October 4, 2000. *Id.*

[10] *Id.* at 907–08.

[11] "A sculpt is a mannequin-like plastic doll without skin coloring, face paint, hair, or clothing." *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* The parties dealt with a range of issues such as, trademark, trade secret, contract, copyright, and antitrust. *Id.*

[17] *Mattel*, 616 F.3d at 909–10. A trademark is "any word, name, symbol, or device, or any combination thereof [used or intended to be used] to identify and distinguish [a producer's] goods . . . from those manufactured or sold by others and to distinguish the source of the goods . . . ." Winchester Mystery House, LLC v. Global Asylum, Inc., 148 Cal. Rptr. 3d 412, 418 (Cal. Ct. App. 2012) (citing 15 U.S.C. § 1127 (2012)). "The use of a trademark is the owner's way of preventing others from duping consumers into buying a product they mistakenly believe is sponsored by the trademark owner. A trademark informs people that trademarked products come form the same source." *Id.* A trademark owner may sue any person of "any word, term, name, symbol, or device, or any combination thereof . . . which . . . is likely to cause confusion . . . as to the origin, sponsorship, or approval of his or her goods . . . ." 15 U.S.C. § 1125(a).

[18] *Mattel*, 616 F.3d at 913. A copyright holder has the exclusive rights:

mainly with the employee contract between Mattel and Bryant.[19] Bryant had signed an "inventions agreement" in January 1999 when he returned to Mattel after his eight-month hiatus.[20] The agreement prohibited "employees from working simultaneously for competing companies and required them to disclose product ideas they conceive of while employed by Mattel."[21] Under the

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> (1) to reproduce the copyright work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

U.S. CONST. art. I, § 8, cl. 8. This list of exclusive rights is exhaustive. Silvers v. Sony Pictures Entm't, Inc., 402 F.3d 881, 886–87 (9th Cir. 2005). Thus, "copyright infringement occurs when a copyrighted work is reproduced, distributed, performed, publicly displayed, or made into a derivative work without the permission of the copyright owner." *Definitions*, COPYRIGHT, http://www.copyright.gov/ help/faq/faq-definitions.html (last visited June 27, 2014). Copyright protects original works of authorship fixed in a tangible medium of expression. *Id.* Notably, copyright protection does not extend to "facts, ideas, systems, or methods of operation, although it may protect the way these things are expressed." *Id.*

[19] Palmeri, *supra* note 7.

[20] *Id.* Bryant stated that although he signed the agreement, he never consulted with a lawyer about it and he did not 'understand everything about it." *Id.* Bryant admitted that while he was still working at Mattel, he had done "extensive sketches of the dolls, used old Barbie doll parts to make a protoype, used a Mattel fax machine to correspond with MGA," as well as had Mattel "coworkers help him design the Bratz logo, paint a prototype doll's face, and implant hair in a dummy doll's head." *Id.*

[21] *Id.* The contract read, "I agree to communicate to the Company as promptly and fully as practicable all inventions (as defined below) conceived or reduced to practice by me (alone or jointly by others) at any time during my employment by the Company. I hereby assign to the Company ... all my right, title and interest in such inventions, and all my right, title and interest in any patents,

copyright infringement claim, Mattel asserted that it had the rights to the sketches and sculpts of the Bratz dolls.[22]

In the beginning, Mattel came out on top: in the first suit in 2008, a Riverside court required MGA to pay Mattel for damages as well as turn over the Bratz name to Mattel and stop producing anymore Bratz dolls even "impos[ing] a constructive trust over all Bratz-related trademarks."[23] However, MGA fought back.[24] The first time that the case went to the Ninth Circuit,[25] Judge Kozinski reversed the injunction as well as the constructive trust rulings,[26] stating that MGA had significantly improved the Bratz product as a result of its investment into the brand and therefore, it would be unfair to revoke MGA's ownership of the billion-dollar brand—even if development of the brand may have started with a misappropriated idea.[27] The case then went back to the district court in April 2011 to resolve whether Mattel was entitled to Bryant's *ideas*.[28] In the retrial, the jury found that Mattel had not

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copyrights, patent applications or copyright applications based thereon." *Mattel*, 616 F.3d at 910. "The contract specified that 'the term "inventions" includes, but is not limited to, all discoveries, improvements, processes, developments, designs, know-how, data computer programs and formulae, whether patentable or unpatentable.'" *Id.* An inventions agreement is valid in California unless it applies to an invention that the "employee developed entirely on his or her own time without using the employer's equipment, supplies, facilities, or trade secret information except for those inventions that either (1) relate to the employer's business . . . or research; or (2) result from any work performed by the employee for the employer." CAL. LAB. CODE § 2870 (2014).

[22] *Mattel*, 616 F.3d at 913.

[23] *Id.* at 909. A constructive trust is an equitable remedy that forces the losing party to transfer over the wrongfully held property (in this case, the Bratz dolls trademarks) to its rightful owner (Mattel). *Id.* The jury's rationale was that Bryant had thought of the name "Bratz" while still at Mattel and that "MGA committed several state-law violations by interfering with Bryant's agreement as well as aiding and abetting its breach;" thus, it awarded Mattel $100 million. *Id.*; Aimee Groth & Gus Lubin, *Bratz Maker Wins a $310 Million Lawsuit and Continues Streak of Kicking Ass*, BUS. INSIDER (Aug. 5, 2011), http://www.businessinsider.com/bratz-mattel-lawsuit-2011-8.

[24] *See generally Mattel*, 616 F.3d 904.

[25] The case went to the Ninth Circuit in 2010 and then again in 2012. *See generally id.*; Mattel, Inc. v. MGA Entm't Inc., 705 F.3d 1108 (9th Cir. 2013).

[26] *See supra* note 23 and accompanying text.

[27] *Mattel*, 616 F.3d at 911.

[28] *Id.* at 918; Edvard Pettersson, *Mattel Loses Bratz Doll Appeals Court Ruling to MGA*, BLOOMBERG (July 22, 2010, 9:01 PM), http://www.bloomberg.com/news/2010-07-22/mattel-s-victory-on-rights-to-

proved its claims of copyright infringement and in fact, found that Mattel had stolen trade secrets from MGA.[29] The jury awarded MGA $88.5 million.[30] MGA then took the case to court again in August 2011 to recover legal costs and punitive damages,[31] which they did—a federal judge ordered Mattel to pay $310 million in damages, punitive damages, and attorney's fees.[32] This ruling alone was not enough for Larian who stated that the Bratz brand was damaged "by an estimated $1 billion" and MGA intended to recoup those losses in an antitrust suit.[33] However, unfortunately for MGA, the U.S. District Court in Santa Ana dismissed MGA's complaint.[34] Then, the parties were back to battle it out again in the Ninth Circuit.[35] Mattel challenged the "jury's verdict that Mattel misappropriated MGA's trade secrets, and the district court's award of attorneys' fees and costs to MGA under the Copyright Act."[36] The Ninth Circuit vacated the jury's verdict regarding the trade secret misappropriation claim, but affirmed the award of attorney's fees and costs.[37]

III. ANALYSIS

A. I'm a Barbie Girl, In a Barbie World—Bratz are Just Living in It: The Parties' Goals

Mattel and MGA had concrete goals in entering the lawsuits. Both companies wanted to come out on top, albeit, for two different reasons. The motivation for winning may have made a critical difference in the outcome of the case. Mattel had decades of built up pride as the Queen Bee of fashion dolls but in 2001,

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bratz-dolls-overturned-by-u-s-appeals-court.html. See also *supra* note 21 for a description of the terms of the contract. The question for the jury was whether an "idea" constituted an "invention" under the terms of the contract. *Mattel*, 616 F.3d at 918.

[29] Chang, *supra* note 7.

[30] *Id.*

[31] *Id.*

[32] Groth & Lubin, *supra* note 23.

[33] *Id.* Antitrust suits are based on the theory that the public has an interest in "fostering open and fair competition." 15 U.S.C. § 1125(a) (2012).

[34] Pettersson, *supra* note 28.

[35] *See generally* Mattel, Inc. v. MGA Entm't Inc., 705 F.3d 1108 (9th Cir. 2013).

[36] *Id.* at 1109.

[37] *Id.* at 1111.

Bratz gave Barbie a run for its money (literally).[38] Barbie's sales were threatened by the arrival of the Bratz dolls because "[w]ith their penchant make-up, risqué fashion, plumped-up lips, and cleavage-baring, belly-showing outfits, they made 47-year-old Barbie seem demure."[39] Mattel did not like the idea of having to compete but instead of working on modifying their own dolls and appealing to its audience, it instead started a war with its competitor.[40] The trouble was that Mattel wanted "everything."[41] On the other hand, MGA was not in it for the pride but rather, for survival.[42] MGA was a small company that was successful due to the Bratz dolls; without the dolls, MGA could be put out of business.[43] Although Mattel had lost some revenue due to the Bratz dolls and wanted to diminish their competition, Bratz had a bigger goal: to stay in business. The fact that Larian's business was on the line meant that MGA had a lot more to lose than Mattel, which was probably a bigger motivator to win than Mattel's pride or miniscule revenue loss. This alone should have signaled to Mattel that MGA would not go down without a good fight. The next few sections will discuss how the parties were blinded by their goals and failed to effectively think outside of their decision-making motivators, which ultimately led to a lose-lose for both parties.

B. Hard-Headed Dolls: Decision-Making Challenges

1. Lack of System 2 Thinking

Both Mattel and MGA faced multiple roadblocks throughout their litigation journey. First of all, the contract

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[38] Jacqui Goddard, *Barbie Doll in Legal Fight with Bratz Girls*, THE SUN (Dec. 11, 2006), http://www.nysun.com/ national/Barbie-doll-in-legal-fight-with-bratz-girls/44925/; Kayce T. Ataiyero, *Barbie Makes Bratz Bow Out*, CHI. TRIB. (Dec. 5, 2008), http://articles.chicagotribune.com/2008-12-05/news/0812040901_1_bratz-dolls-mga-entertainment-district-judge-stephen-larson.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Court Ruling Could Remove Bratz from Shelves*, 10 TV (Dec. 5, 2008), http://www.10tv.com/content/ stories/2008/12/05/bratz.html.
[43] *Id.*

between Bryant and Mattel was ambiguous;[44] therefore, it may have been clear that if the jury found against MGA (which it did), MGA would appeal.[45] In the appeal, Judge Kozinski stated that the "employment contract was not clear enough to establish beyond doubt that [Bryant's] Bratz concept belonged to Mattel."[46] In hindsight, had Mattel's attorneys utilized System 2 thinking, they may have been able to predict that litigation would not have provided the solution they wanted. System 2 thinking involves slow, deliberate, effortful, and conscious reasoning whereas System 1 thinking is more intuitive, effortless, automatic, and unconscious.[47] Mattel began the lawsuit at a time of desperation: when it noticed that its sales were plummeting due to competition from the edgier Bratz dolls.[48] Instead of using System 2 thinking and deliberating over a way to enhance its own line, it took what they thought would be the easy step: sue and gain ownership of the successful Bratz dolls. It is clear that neither party utilized this type of in-depth thinking because had they done so, they would have realized that litigation would cause both parties to lose millions of dollars as well as waste their time while settling the dispute through alternative dispute resolution[49] would have saved that money and time. That money and time could have been used to design and create more dolls and promote their name through advertisements instead of wasted on attorneys' fees and court costs that would do nothing but tarnish their image.

2. Unwillingness to Settle

Allegedly, Mattel's CEO, Bob Eckert, never met with Isaac Larian to discuss a royalty deal and as mentioned before, Mattel

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[44] *See supra* notes 20–21, 26; *see also Mattel Loses Copyright Case Against Ex-Employee and Bratz Inventor*, OUT-LAW (July 26, 2010), http://www.out-law.com/page-11252 [hereinafter *Mattel Loses Copyright Case*].
[45] *See supra* note 24.
[46] *Mattel Loses Copyright Case*, *supra* note 44.
[47] *Two System Thinking*, http://timreidpartnership.com/Site/An_introduction_to_2_system_thinking.html (last visited June 22, 2014).
[48] Alex Veiga, *Mattel Claims Rival Toy Maker Stole Trade Secrets*, S. COAST TODAY (Nov. 22, 2006, 12:00 AM), http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20061122/NEWS/311229912&cid=sitesearch.
[49] *See infra* Part IV.A.

wanted "everything."[50] Mattel failed to realize that although it would get the psychological satisfaction of putting MGA out of business, they would not "realize any upside from it except the relatively [small amount of] damages they were awarded."[51] When the parties entered litigation, they most likely did not anticipate that the trial could go on for years. Because of this, they, like most parties, likely overlooked the likelihood of an appeal and did not plan for what would happen in the case of an appeal.[52] A study of appellate court reversal rates shows that reversal rates are surprisingly high.[53] Had Mattel or MGA considered the number of times that the case may have been appealed, the companies may have concluded with a settlement rather than continued with litigation.[54]

3. Biases and Misconceptions

Lack of willingness to settle could be tied to certain biases the parties may have. One such bias is the fundamental attribution error.[55] This bias does not allow the parties to think rationally but rather invokes a rapid response where the parties avoid thinking about the actual events that started the litigation and gets them to focus on the *perceived* motives and character flaws of the opposing party.[56] However, this tendency to attribute behavior to dispositional factors instead of situational factors is reversed when parties refer to themselves.[57] When parties talk about their own actions, they highlight their innocence and vulnerability, and claim that any negative actions they took were due to duress from the other party.[58]

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[50] Gina Keating & Aarthi Sivaraman, *Analysis—Mattel, MGA Better off Settling on Bratz*, REUTERS (Dec. 10, 2008), http://www.reuters.com/article/2008/12/10/idUSN0548672420081210.

[51] *Id.*

[52] *See* RANDALL KISER, BEYOND RIGHT AND WRONG 357 (2010).

[53] *Id.*

[54] *See infra* Part IV.A for an explanation of how alternative dispute resolution could have prevented the parties' downward spiral in the court system.

[55] KISER, *supra* note 52, at 92.

[56] *Id.* For example, instead of admitting some fault, the defendant may claim that a plaintiff is only filing suit because he is "greedy" or "trying to find someone to blame for their own business problems." *Id.*

[57] *Id.* Basically, when others harm us, they are "bad" people, but when we harm them, it is due to some situational factor, like duress. *Id.* at 92, 94.

[58] *Id.*

In the case at hand, Mattel accused MGA of bribing and secretly hiring Mattel employees for side projects while MGA retorted by accusing Mattel of spying on its salesman by masquerading as buyers, paying off retailers to favor Barbie over Bratz, and rearranging the doll displays at stores like Walmart.[59] Instead of accepting that MGA did, in fact, make a mistake in secretly meeting with Mattel, Larian pointed fingers at Mattel saying, "The people at Mattel are crooks."[60] By operating in this mindset, Mattel and MGA made enemies of each other instead of realizing that they could both help each other prosper, and that perhaps the competition that each provided would be a successful motivator in creating unique and innovative toys.

The lawyers, also, did not challenge the parties' thinking, and in fact, may have furthered their viewpoints.[61] When lawyers do this, they end up surrendering their own ability to secure a settlement.[62] For example, MGA lawyer, Jennifer Keller, depicted Larian as an innocent, hopeful immigrant who was being bullied by a huge corporation or as she calls it, "a cubicle farm."[63] Unlike, Jennifer Keller, Mattel's lawyer, John Quinn, was tougher and unsympathetic, illustrating MGA as a conniving company that had taken confidential information from Mattel.[64] Keller; however, validated Larian's thinking, stating that Mattel did not go after Bratz due to principal but only because it wanted to diminish Bratz's success.[65]

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[59] Abram Brown, *The Toy Mogul Who Became a Billionaire Through His Fight to the Death with Barbie*, FORBES (Oct. 30, 2013), http://www.forbes.com/sites/abrambrown/2013/10/30/the-toy-mogul-who-became-a-billionaire-through-his-fight-to-the-death-with-barbie/.
[60] *Id.*
[61] According to Professors Austin Sarat and William Felstiner, who have studied attorney-client relationships and observed how the attribution of motives to other people have shaped stories and objectives of the attorney's representation, lawyers not challenge a client's attempts at exculpation. KISER, *supra* note 52, at 92.
[62] *See id.*
[63] Chang, *supra* note 7.
[64] *Id.*
[65] *Id.*

4. Overconfidence

The lack of forethought led the parties to develop an overly confident mindset. Psychology professors Elizabeth Loftus and Willem Wagenaar found that in general, lawyers are overconfident in their chances of winning, especially in cases in which they had been highly confident to begin with.[66] This overconfidence leads to inaccurate forecasting, which may inevitably cause lawyers to make the wrong decision by choosing to continue to litigate instead of settle the case.[67] An important aspect to consider in the current cases is the fact that both sides hired highly successful lawyers.[68] Because of this, both parties must have felt confident and optimistic about the outcome. Unfortunately, many psychologists have deemed overconfidence as the "most significant contributor to decision-making failures."[69] For example, overconfidence in the employee contract blind-sighted Mattel; thus, Mattel failed to see the ambiguities that the contract had in place.[70] The fact that the contract "lacked clarity on whether 'ideas' and inventions outside an employee's regular scope of employment could be included as 'inventions' under the contract directly" was a major roadblock in Mattel's argument. Both parties simply trusted their attorneys to produce desirable outcomes, believing that because they had hired experts in the field, those experts would be superior decision-makers and predictors. However, studies show that increased experience may in fact be detrimental to good decision-making

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[66] KISER, *supra* note 52, at 21.
[67] *Id.*
[68] *See Jennifer Keller*, KELLER RACKAUCKAS, http://krlawllp.com/jennifer-l-keller/ (last visited July 3, 2014) (stating that Jennifer Keller, the lawyer for MGA, has been listed annually in the "The Best Lawyers in America"); *see also John B. Quinn*, QUINN E. MANUAL, http://www.quinnemanuel.com/attorneys/quinn-john-b.aspx (last visited July 3, 2014) (mentioning that John Quinn, the attorney for Mattel, has been named "One of the World's Leading Litigation Lawyers").
[69] KISER, *supra* note 52, at 124. "Optimistic overconfidence drives an attorney's risk-taking conviction that, despite a low likelihood of prevailing at trial, somehow his case will be more appealing and meritorious than similar cases and he can present it more persuasively than another attorney." *Id.*
[70] Tom Zuber & Ryan Smith, *Mattel v. MGA: Specific Employment Contract Terms Dictate Employer Copyright Claims*, L. UPDATES (Oct. 18, 2010), http://www.lawupdates.com/commentary/imattel_v._mga_i_specific_employment_contract_terms_dictate_employer_copyri/.

because it fosters overconfidence.[71] This overconfidence kept each party hanging on, believing that they would come out on top, thus neither party ever felt the need to settle.

Overconfidence is especially dangerous for parties because it not only allows parties to believe that their chances of success are high, but it also furthers another cognitive bias: the confirmation bias.[72] The confirmation bias describes the idea that a decision-maker "is more likely to seek information that confirms rather than questions his initial thoughts and opinions."[73] Thus, parties will not only be over-confident in their belief, but will also only seek out information that furthers their confidence, thus exacerbating the problem.[74] This combination emboldens parties to set unrealistic expectations for settlement negotiations or trial outcomes and thus ensures that settlement is never reached and judgments are continuously appealed. The attorneys for Mattel and MGA had similar evidence because the employment contract was so ambiguous; however, because each party got wrapped up in their viewpoints over the eight-year period, they could no longer have an unbiased view of the issues at hand. Thus, they could not help but believe their own arguments.

To quell the overconfidence problems, parties must take active steps to think into the future and evaluate each scenario that may occur before plunging headfirst into the legal battlefield.[75] One way to have mitigated this problem was by performing a premorten exercise, which asks people to "imagine that 'it is months into the future and that their plan has been carried out. And it has failed. Then explain why it has failed."[76] Had Mattel and MGA performed this exercise, perhaps they would have been more in touch with the fact that failure was a possibility and

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[71] KISER, *supra* note 52, at 299.
[72] *Id.*
[73] Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979).
[74] Brian M. Spangler, *Heads I Win, Tails You Lose: The Psychological Barriers to Economically Efficient Civic Settlement and a Case for Third-Party Mediation*, 2012 WISC. L. REV. 1435, 1444 (2012), *available at* http://wisconsinlawreview.org/wp-content/files/4-Spangler.pdf
[75] KISER, *supra* note 52, at 348.
[76] *Id.* at 349.

realized that each party could appeal and bring multiple causes of action that would eventually end up draining the parties' pockets without ever achieving either of their goals.[77]

5. Sunk-Cost Biases

The sunk-cost bias occurs when people have already made a large investment whether with their time or money so they continue to invest even after they learn that further investments could only lead to further losses.[78] People behave this way in an effort to "reduce dissonance resulting from bad decisions."[79] This is clearly illustrated in the current case. After losing at the district court level, MGA appealed in an effort to dissipate the damages; however, this only led to a series of lawsuits launched by both parties.[80] When Mattel was told by the court to pay for MGA's attorney's fees, it appealed the decision in an effort to overrule the decision but all they ended up doing was digging themselves in a bigger hole by wasting more time and accruing more legal fees.[81] The award was passed back and forth between the parties as they proceeded from court to court, which only furthered the sunk-cost bias because the parties continued to try and mitigate past harm with the mindset that they had come this far, why stop now?[82]

However, the parties should have taken note that "effective decisions can only be forward-looking" and there was no way to truly mitigate bad past decisions;[83] therefore, dumping more money into a claim that seemed to be going nowhere would only exacerbate the harm.[84] The parties were caught up in the legal whirlpool and should have taken a step back, forgotten about the

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[77] Tim Cushing, *It's Finally Over: 8 Years of Mattel vs. Bratz and No One's Getting Paid But the Lawyers*, TECHDIRT (Jan. 29, 2013), https://www.techdirt.com/articles/20121019/17344420768/its-finally-over-8-years-mattel-vs-bratz-no-ones-getting-paid-lawyers.shtml (commenting on the fact that when the lawsuits ended, both parties ended up with zero damages).
[78] KISER, *supra* note 52, at 136.
[79] *Id.* This thought process renders people to spend more money on projects with poor track records rather than good ones. *Id.*
[80] *See supra* Part II.
[81] *Id.*
[82] KISER, *supra* note 52, at 138.
[83] *Id.*
[84] *See supra* note 77 and accompanying text (mentioning that in the end, no one but the lawyers truly won).

harm that had already occurred, and asked themselves if they had not begun the lawsuit already, would they have done so knowing what they know now."[85] If the answer is no, the parties should stop the suits before any more time and resources are consumed.[86] MGA and Mattel kept fighting with the hope that *this time* they would get their money back, but in thinking this way, they only dug themselves into a bigger hole.

C. Fortune-Teller Barbie: Antecedents that May Have Signaled the Outcome

Mattel's failures were tied largely to the fact that they did not think ahead. Of course, in hindsight, so much more is obvious than prior to litigation, but there are some factors that were predictable before litigation even began. Mattel could not have predicted who the members of the jury would be when it first took the case to trial in 2008, but it could have predicted that MGA would not hand over a billion dollar corporation after one measly trial. This means that it was foreseeable that an appeal from any pro-Mattel decision was in the near future and that the appeal would have landed in the hands of libertarian Judge Kozinski who "most nearly embodies the brazen, multi-cultural style embodied in Bratz dolls."[87] Although in 2010, Kozinski ruled that MGA's trade secret claim should have never reached the jury, it did side with MGA on the copyright claim.[88] Perhaps Mattel could have taken a hint from its previous encounter with Judge Kozinski in *Mattel, Inc. v. MCA Records*.[89] In that case, Mattel had sued MCA Records for trademark infringement when Barbie's name was used

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[85] KISER, *supra* note 52, at 138.
[86] *Id.*
[87] John Duffy, *Barbie v. Bratz: How a Famous Feminist, a Judicial Hottie and Millions in Legal Fees are Producing Our Era's Most Interesting Case on Ownership of Ideas*, CONCURRING OPINION (Apr. 26, 2011), http://www.concurringopinions.com/archives/2011/04/barbie-v-bratz-how-a-famous-feminist-a-judicial-hottie-and-millions-in-legal-fees-are-producing-our-era's-most-interesting-case-about-the-ownership-of-ideas.html. "Chief Judge Alex Kozinski is widely known as the one of the most flamboyant, controversial, and intellectual judges in the federal courts. Not allergic to publicity, Kozinski once nominated himself for the 'Judicial Hottie' contest run by the edgy, then-anonymous blog 'Underneath Their Robes.'" *Id.*
[88] *See generally* Mattel, Inc. v. MGA Entm't Inc., 616 F.3d 904 (9th Cir. 2010).
[89] 296 F.3d 894 (9th Cir. 2002).

in a song called "Barbie Girl."[90] Judge Kozinski dismissed the whole trial and famously concluded that "[t]he parties are advised to chill."[91] Judging from Kozinski's rulings,[92] it would have been reasonable for the parties to conclude that he does not like frivolous lawsuits that do nothing more than waste time and money.[93] In a speech to lawyers and law students at Georgia State University College of Law, Kozinski emphasized that conversation and collaboration between the parties could have not only prevented negative consequences, but also could have possibly created mutually beneficial opportunities.[94] Knowing that Kozinski does not hesitate to shoot down frivolous lawsuits,[95] Mattel should have made more of an effort to settle out of court instead of allow the case to face a critical judge.

Furthermore, during the initial stages of the lawsuit, Mattel underestimated the emotional appeal of the underdog. It failed to consider the empathy that Larian could draw from his audience—in this case: the jury. It's a classic tale: the big, bad bully and the wimpy kid, but in this case, the bully was a corporate giant and the wimpy kid was a poor, Iranian immigrant who moved to America with $750 in his pocket to live out the American dream.[96] Larian had grown up in prerevolutionary Tehran and was one of five children of a poor, Jewish salesman.[97] Mattel failed to see that a man living out the American Dream would be the perfect ending to an almost decade long war.

IV. DISCUSSION

A. Bratz and Barbie's Missed Opportunity: Alternate Dispute Resolution

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[90] *Id.* Mattel had argued that the song ruined Barbie's image as a cultural icon. *Id.*
[91] Shinji Morokuma, *My Favorite Judge*, ADR INST. OF ALBERTA (Dec. 2012), http://www.digitalsmarttools.com/eADRIA/My_Favorite_Judge.htm.
[92] *See generally id.* (highlighting several cases which Judge Kozinski believes should have never come to court).
[93] *Id.*
[94] *Id.*
[95] *See id.* (citing Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986)).
[96] Brown, *supra* note 59.
[97] *Id.*

"[C]ompeting through litigation could hurt competition through decreased innovation and fewer options for consumers[;]"[98] therefore, parties should take steps to come to a reasonable settlement agreement. Alternative dispute resolution is a method of resolving disputes out of the courts.[99] It includes arbitration,[100] mediation,[101] and negotiation.[102] Parties may prefer alternate dispute resolution because it is less expensive, less time consuming, and more private than litigation.[103] Also, it is voluntary, convenient, and flexible to the needs of the participants.[104] Furthermore, settling cases out of the courts allows the parties to exercise control over the process; therefore, it is likely to produce more satisfactory results to both parties since it allows them to form a relationship with each other and participate more directly in the process.[105] Notably, parties may turn to alternate dispute resolution at any stage of the dispute.[106]

To successfully proceed with alternative dispute resolution, the parties must first evaluate which process to use. Although negotiation is one of the most widely used methods of dispute resolution,[107] and is generally preferred since it only involves the disputing parties without a neutral third party,[108] it is fair to assume that it was not the route to use in this case since the key to

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[98] Melissa Black, *Analysis: How Apple Overwhelmed Samsung's Patent Case Tactics*, 19 NO. 10 WESTLAW J. INTELL. PROP. 3, *2 (2012).
[99] 1 JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION § 1:1 (3d ed. 2014)
[100] *Id.* Arbitration most resembles litigation and is adjudicatory. *Id.* During arbitration, "presentations are made to one or more neutral decision makers who make a binding award." *Id.*
[101] *Id.* Mediation is a nonadjudicatory process. *Id.* Nonadjudicatory processes increase party autonomy because they give parties more input into the process. *Id.*
[102] A negotiation is an interpersonal decision-making process necessary whenever we cannot achieve our objectives single-handedly. LEIGH L. THOMPSON, THE MIND AND HEART OF THE NEGOTIATOR 2 (5th ed. 2012). As a mixed-model enterprise, negotiation requires cooperation and competition. *Id.* at 13.
[103] GRENIG, *supra* note 99, § 1:2.
[104] *Id.*; *Id.* § 1:1.
[105] *Id.* § 1:2.
[106] *Id.* § 1:12.
[107] STEVEN GOLDBERG, ERIC D. GREEN & FRANK E. A. SANDER, DISPUTE RESOLUTION 19 (1985) [hereinafter DISPUTE RESOLUTION].
[108] *Id.*

negotiation is compromise.[109] Given the fact that Bryant reached a settlement agreement early on and departed the lawsuit, yet MGA and Mattel continued with litigation, it is clear that the parties could not easily come to an agreement that satisfied either of them without help from a third party. Therefore, negotiation, in this case, would likely only exacerbate the conflict since the parties would go head to head in an uncontrolled environment, as opposed to a courtroom where they were obligated to maintain a professional demeanor.[110] Arbitration is more like litigation because the parties present evidence to a neutral third party, who then renders his decision,[111] which may be binding or non-binding depending on what the parties choose.[112]

Mediation, however, is like arbitration in that there is a neutral third party, but is advantageous in that it allows the parties to have more control over the proceedings. Although the mediator is involved in the process to ensure constant communication as well as clarity and peace between the two sides, the parties are the ones who ultimately come up with the settlement agreement. By entering into mediation, MGA and Mattel may have reached a satisfactory outcome and achieved a win-win situation for both parties where neither would be feel like a clear loser.

During mediation, the mediator can meet in a private caucus with each party,[113] which would have allowed both MGA and Mattel to voice their concerns freely. Also, the presence of a mediator may have remedied many of the psychological

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[109] Karen L. Henry, *Med-Arb: An Alternative to Interest Arbitration in the Resolution of Contract Negotiation Disputes*, 3 OHIO ST. J. ON DISP. RESOL. 385, 387 (1988).

[110] Although it is possible that had the parties decided early on that they would argue fairly and reasonably, they could have easily negotiated the outcome. However, when their greed and stubbornness got involved, negotiation quickly stopped being an option.

[111] DISPUTE RESOLUTION, *supra* note 107, at 149.

[112] Henry, *supra* note 109, at 389. Arbitration is less formal than litigation because the parties can set the procedural rules and substantive law to be used. DISPUTE RESOLUTION, *supra* note 107, at 8. Although this method could work for MGA and Mattel, it seems that it would render the same results that litigation would have since the parties are not making the final decision regarding the dispute.

[113] Henry, *supra* note 109, at 387.

impediments[114] that hindered the parties' abilities to think rationally and come up with a reasonable conclusion because the mediator, as someone who has no emotional or financial resources invested in the matter, would have been able to sensibly display the issues at hand and provide the parties with a clear perspective of the situation by presenting the multiple options that are available to them outside of just winning or losing a lawsuit.[115] The mediator may have proposed several creative resolutions that go beyond merely handing over millions of dollars to the opposing party.

Since the lawyers in this case had to zealously defend their clients, they also were hit with the same hindrances that prevented their clients from seeing beyond the courtroom walls; however, a mediator, as a neutral third party, could have privately conferred with each party to see what each party was *actually* looking to gain.[116] Perhaps Mattel was not the bully it was made out to be but rather a panicked corporation acting out in despair, and perhaps its real hope was that at the end of the lawsuit, MGA and Mattel would have been able to help each other in creating the next set of popular children's toys. Since a mediation conference is more amicable than litigation, parties' goals are better assessed during mediation, thus producing more favorable outcomes. Regrettably, in this case, by failing to use System 2 thinking and by failing to take a step back before plunging headfirst into a lawsuit, the parties dove straight into the arms of a catch-22 where their lack of System 2 thinking and their lack of foresight dissuaded them from entering a mediation, which thus led to further System 1 thinking and further lack of foresight.

Mediation[117] would have allowed each party to exercise control over the outcome and mitigate the risks.[118] MGA should

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[114] *See supra* Part III and *infra* Part IV.B.

[115] *Id.* (expressing that one option for the parties was to work together to debut a line of dolls that would increase both their successes).

[116] Judge Kozinski expresses how sometimes parties want something simple that could be easily resolved without wasting the parties time and money or the court's resources. *See* Morokuma, *supra* note 91. For example, he states that in *United States v. Adams*, 383 U.S. 39 (1966), that an apology for stealing Adams' invention was all Adams wanted. *Id.* Or, sometimes all the parties want is a mutually beneficial publicity plan—something that can be easily negotiated for in a settlement agreement, thus rendering litigation unnecessary. *Id.*

[117] "Mediation is a process of assisted negotiation in which a neutral person helps people reach an agreement." DWIGHT GOLANN & JAY FOLBERG,

have proposed that it pay Mattel a certain amount of money to make up for the fact that some of the early ideas or material had come from Mattel, and it should also have suggested that the two companies work together to design a line of dolls or toys that would make them both even more successful. Perhaps if Mattel had seen that MGA was willing to face some consequences as well as take further action to help both companies succeed, it would not have been so keen to bring suit. The fact that MGA did not address any fault and tried to play the victim probably enraged Mattel officials even more. Although Larian claims that it is Mattel's fault that they did not settle—blaming it on the fact that Mattel's CEO did not even contact them about a royalty deal[119]—this could just be a case of selective memory, which is when people remember things differently from how they actually are.[120] In interviews with attorneys, Professors Gross and Syverud found that "81% of plaintiffs and 72% of defendants blamed the other side or an extrinsic factor when" asked why the case went to trial.[121] Though selective memory and blame on extrinsic factors is generally harmless in everyday life, it is detrimental when it comes to pre-trial settlement negotiations.[122] It is possible that MGA may have misinterpreted Mattel's action and once they did so, they had it ingrained in their memory that Mattel would never want to settle, so they never challenged that memory. Regardless, each party should have kept in mind that "'big wins' can be overturned during the appeals process" and since both sides have high-powered attorneys, either party could end up losing or winning $100 million.[123]

B. Paging Dr. Barbie: Gaining Awareness of Cognitive Barriers

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MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL, 89 (Wolters Kluwers, eds., 2d ed. 2011); *see also* Part IV.A.

[118] Ivy Roberts, *Bratz vs. Barbie and the Case for Mediation*, LIGHTHOUSE MEDIATION (Apr. 25, 2011), http://lighthousemediation.wordpress.com/2011/04/25/bratz-vs-barbie-and-the-case-for-mediation/.

[119] *See supra* note 50 and accompanying text.

[120] KISER, *supra* note 52, at 92.

[121] *Id.* at 138.

[122] *Id.* at 92.

[123] Roberts, *supra* note 119.

Notably, certain behaviors throughout the case may have cast a negative light on each party—both in the way that the adverse party viewed them and in the way that the judge and juries viewed them—which prevented settlement. Mattel believed it was entitled to the entire Bratz line just because Bryant had an idea while still employed there. Although California enforces employment agreements that are designed to protect a company's trade secrets,[124] such as the employee contract between Bryant and MGA, Mattel wrongfully presumed that this agreement would allow it possession over the entire Bratz line even though most of the effort that made Bratz a success was done at MGA.[125] Mattel was ignorant and failed to see the numerous cases in which a product or idea was created while an employee worked for one company, but later gained popularity at another business.[126]

However, even if we take Mattel's claim that MGA stole some of its trade secrets when Bryant went to work for them as plausible; it cannot be denied that it was far-fetched to state that Mattel had copyright ownership of the idea for Bratz.[127] By suing for copyright infringement, Mattel lost credibility as well as portrayed themselves as the bully that MGA claimed it was because, as Judge Kozinski held, "Mattel can't claim a monopoly over fashion dolls with a bratty look or attitude, or dolls sporting

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[124] Jeffrey S. Klein, Nicholas J. Pappas & Daniel J. Venditti, *The Trade Secrets Exception to California's Ban on Noncompetition and Nonsolicitation Agreements After Edwards v. Arthur Andersen, LLP*, WEIL (Dec. 6, 2013), http://www.weil.com/news/pubdetail.aspx?pub=12353.

[125] *See infra* note 129 and accompanying text.

[126] For example,

> Steve Wozniak was at HP when he built the first Apple computer (and continued to work there for some time after Apple was moving forward). Robert Noyce helped found Fairchild (and later Intel) after growing frustrated at Shockley Transistor. Hell, William Shockley founded Shockley Transistor after feeling he didn't get enough respect at Bell Labs.

Mike Masnick, *Why Should Mattel Get Future Plans for New Bratz Dolls*, TECHDIRT (May 29, 2009, 6:58 AM), https://www.techdirt.com/articles/20090527/0143345018.shtml.

[127] Gillian Flaccus, *Mattel Loses its Copyright Suit Against MGA Over Bratz Dolls*, USA TODAY (Apr. 21, 2011), http://usatoday30.usatoday.com/money/industries/retail/2011-04-21-mattel-mga-bratz-dolls-suit.htm.

trendy clothing—these are all unprotectable ideas."[128] By making such a claim, Mattel showed no sympathy for the fact that although the idea of Bratz may have originated while Bryant was working at MGA, a lot of the work and effort that made Bratz successful came from MGA.[129] Complete disregard for the effort that MGA put into making the dolls a success probably made Mattel look like a greedy corporation simply hungry to destroy the competition, which made it easier for Larian to successfully play the victim and appeal to the judge and jury.[130]

Another major issue was the parties' state of mind that one doll could not live in a world where the other existed.[131] Although Barbie sales had gone down, it did not mean that Barbie was out of the market for good.[132] In fact, some parents did not even like Bratz or buy them for their kids, judging them to be too sexual.[133]

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[128] *Jury Rejects Mattel's Claims to Bratz Dolls*, MY FOX ATLANTA (Apr. 21, 2011, 5:12 PM), http://www.myfoxatlanta.com/story/17921880/jury-rejects-mattels-claims-to-bratz-dolls.

[129] *See* Mattel, Inc. v. MGA Entm't, Inc., 616 F.3d 904, 907 (9th Cir. 2009) (finding that Mattel could not take away all of MGA's rights to the Bratz dolls because MGA had sweat equity in the dolls). Sweat equity is the "ownership interest, or increase in value, that is created as a direct result of hard work by the owner(s)." *Sweat Equity*, INVESTOPEDIA, http://www.investopedia.com/terms/s/sweatequity.asp (last visited July 3, 2014).

[130] *See* Margaret Talbot, *Little Hotties*, NEW AMERICA (Dec. 5, 2006), http://newamerica.net/node/7772 (quoting the Ninth Circuit in stating that Mattel "'can't claim a monopoly over fashion dolls with a bratty look or attitude, or dolls sporting trendy clothing. These are all unprotectable ideas.' What can be protected is not the idea but its specific expression: Stephanie Meyer didn't have a monopoly on vampire stories, nor Degas on pictures of ballet dancers, and Mattel didn't have one on fashion-forward plastic dolls.").

[131] Elana Centor, *The Bratz-Barbie Doll Fight. Who Really is the Winner?*, BLOGHER (Aug. 28, 2008), http://www.blogher.com/bratz-barbie-doll-fight-who-really-winner.

[132] *Id.*

[133] Geoff Boucher, *Movie Gives Bratz Dolls Whole(some) New Look*, LA TIMES (Aug. 5, 2007), http://the.honoluluadvertiser.com/article/2007/Aug/05/il/hawaii708050311.html. Some parents think that the dolls look like "10-inch tall hoochie mamas" and the American Psychological Association has commented that "it is worrisome when dolls designed specifically for 4- to 8-year olds are associated with an objectified adult sexuality." Parents commented that Barbie comes off as more wholesome. Debra Alban, *Barbie vs. Bratz Battle Rages on to the End*, CNN (Dec. 12, 2008), http://www.cnn.com/2008/LIVING/wayoflife/12/11/bratz.vs.barbies/index.html

Mattel failed to realize that regardless of the recent drop in revenue, it was still a company that had produced a doll that was relevant for fifty years—a doll that would probably stay relevant regardless of the small crisis it was facing. Barbie has history on her side and has become a collector's item for nostalgic adults—something that perhaps Bratz would not have, at least for a very long time.[134] What Mattel overlooked while it was too busy trying to commit Bratz genocide was that ironically, its efforts in destroying the company ended up making the dolls more popular as the lawsuit called attention to the newly developed dolls.[135]

Parties are confident in their ability to succeed in trial but fail to realize that win-win trials are rare.[136] Parties must be cautious of falling victim to the "Ken Basin Syndrome."[137] The "Ken Basin Syndrome" is the pressure and adrenaline rush that people feel when put under the spotlight that make them feel like they are just playing in a game rather than dealing with real money and real people. For example, it is arguable that after a certain point in the eight-year legal battle, MGA and Mattel felt like they had no choice but to continue to litigate and finish the game they started because they had a national audience waiting for the game to end in court, and not in some secret room with secret results.

?iref=newssearch. However, at the same time, other parents dislike Barbie stating that it gives young girls a poor self-image. *Id.*

[134] Keosha Johnson, *Can Barbie Survive Another 50 Years?*, TODAY (Feb. 14, 2009), http://www.today.com/id/ 29199371/ns/today-today_style/t/can-barbie-survive-another-years/#.U7ZY88ZsxQ5. Notably, Barbie sales have gone up since the creation of eBay and designer Barbie dolls. *Id.*

[135] Centor, *supra* note 131. Some people even state that they had not even known about the Bratz dolls until news of the lawsuit broke out. *Id.*

[136] KISER, *supra* note 52, at 25. "Only 15% of the trials [Gross and Syverud] studied resulted in an award for a plaintiff that was greater than defendant's settlement offer but less than plaintiff's demand, 'and in some of these cases, the entire gain for one side, or both, will have been consumed by the trial costs." *Id.*

[137] Ken Basin is a graduate of Harvard Law School. He was a contestant on "Who Wants to Be a Millionaire?" in 2009. He made it all the way to the $1 million question, and lost. David Lat, *Who Wants to Be a Millionaire? Ken Basin, Harvard Law '08, Sure Does*, ABOVE THE LAW (Aug. 25, 2009), http://abovethelaw.com/2009/08/who-wants-to-be-a-millionaire-ken-basin-harvard-law-08-sure-does/. He was the first person in the United States to make it to the million dollar question and lose. *Who Wants to Be a Mllionaire Wiki*, MILLIONAIRE WIKIA, http://millionaire.wikia.com/wiki/Ken_Basin (last visited Oct. 15, 2014).

When making decisions whether in trial, a game-show, or even in everyday life with a friend or spouse, people act on impulse and forget to take a step back and evaluate the consequences. Mattel and MGA demonstrate clearly how System 1 thinking leads to an uphill battle where no one reaches the top. Even when people or parties are at first attacked by one party, when those people act rationally and propose solutions in the face of conflict rather than attacking back, they may actually ignite System 2 thinking and rational behavior from the attacking party, causing that party to also react with rationality rather than anger, thus producing a more desirable result for all involved. When making decisions, parties must evaluate their goals and what they internally want to accomplish. They should not alter that goal once they learn that their enemy wants the same result. Further, it is important for people and business organizations to realize that the best outcomes may come when they have the ability to discuss with others because it mitigates animosity and has everyone reaching to help the other out—rather than looking to destroy the competition.

Notably, because of the multiple psychological barriers that the parties faced, settlement may have been out of the question without outside help. The problem is that when parties are unaware of factors that affect people's decision-making, they can easily categorize the opposition as power-hungry or greedy. However, by gaining insight into people's decision-making behaviors, parties will learn that many factors are at play such as pride, money, lack of foresight, fear, and other internal conflicts that prevent the parties from making sensible decisions. When evaluating decisions, parties must take a step back, essentially detaching themselves from their own opinions, and look into the proceedings in a third-person perspective in order to see the bigger picture. In doing so, they might realize that they have left their goals behind and are simply playing a game instead of zeroing in on the reason they began litigating in the first place. Furthermore, parties must make a conscious effort to avoid rejecting an offer simply because it is also beneficial to the opposing party[138]

[138] This type of behavior is characterized as reactive devaluation. Reactive devaluation is "the tendency for an individual to evaluate concessions and settlement proposals less favorably after they have been offered by the adverse party." Spangler, *supra* note 74 (citing Lee Ross & Constance Stillinger,

because this behavior directly inhibits settlement, as parties end up rejecting fair and reasonable offers solely because they have been offered by the opposing party. In avoiding this pitfall, parties can work toward an agreeable resolution.

Mattel and MGA, like the many business organizations that came before them and the many more that will come after,[139] will continue to miss opportunities to settle any issues, and inevitably sacrifice their reputation and profits for the sake of their egos if they do not implement a well-established and informative strategy for handling lawsuits. Although many companies have begun to create company-wide policies of how to react when hit with a lawsuit,[140] few have emphasized the importance of identifying the cognitive barriers that stand in their way. "Insight into the psychological dynamics of how disputes escalate can be of great assistance."[141] Before a lawsuit, parties should inform themselves of the factors that may lead to illogical decision-making.[142] Innovators, attorneys, and employers should take note of the mistakes that MGA and Mattel made because they show how quick judgments and a desire to win could actually result in a lose-lose for everyone involved.

This article proposes that corporations implement a training program for managers and high-level executives that would educate them of the cognitive biases that may impede settlement. Further, it recommends that companies employ an in-house

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Barriers to Conflict Resolution, 7 NEGOTIATION J. 389, 394–95 (1991); LEE ROSS, *Reactive Devaluation in Negotiation and Conflict Resolution*, in BARRIERS TO CONFLICT RESOLUTION 26, 28 (Kenneth J. Arrow et al. eds., 1995)).

[139] For example, Samsung and Apple, the leaders in the smartphone industry, have been battling for years regarding various patent rights. Kurt Eichenwald, *The Great Smartphone War*, VANITY FAIR (June 2014), http://www.vanityfair.com/business/2014/06/apple-samsung-smartphone-patent-war. Like MGA and Mattel, Apple and Samsung spent too much time in court rather than attempting to negotiate an agreement; hence, drawing out their problems and preventing a reasonable resolution. *Id.*

[140] CATHERINE CRONIN-HARRIS, BUILDING ADR INTO THE CORPORATE LAW DEPARTMENT 57–67 (1997) (listing the many companies that have implemented ADR into their corporations, like Bellsouth, Burger King, Chevron, Ford Motor, General Motors, Motorola, Whirlpool, Xerox, etc.).

[141] SUSAN BLAKE, JULIE BROWNE, & STUART SIME, PRACTICAL APPROACH TO ALTERNATIVE DISPUTE RESOLUTION 17 (Oxford Univ. Press 2012).

[142] *See* Part III for an overview of those factors.

psychologist who would work with the corporation and the corporation's attorneys during pre-trial preparation to help them form an unprejudiced opinion as to their case's potential.[143] Because of the parties' and attorneys' labor intensive and emotional involvement with the lawsuit, they may be too stubborn to give in to the other party's demands; however, an in-house psychologist, whose sole purpose would be to ensure that the corporation and its attorneys see both sides of the issue and consider all possible outcomes, may be one way for parties to break out of their egocentric shell. Furthermore, because lawyers may get emotionally attached to their clients' cases, they may not always be the best advisors as to whether or not the corporation should settle as they may be unwilling to allow the corporation to apologize to the opposing party, which delays settlement.[144] However, a psychologist, by showing the corporation its weaknesses in the case, could urge the corporation to apologize in order to create a more amicable negotiation proceeding and ensure that the other party views the corporation's settlement offer as adequate. Moreover, a training program can diminish a corporation's notion that settlement negotiations may suggest weaknesses to an adversary; [145] therefore, encouraging settlement at the commencement of trial preparation rather than around the trial date in order to preserve the corporation's resources.

Knowledge of cognitive barriers gives parties and attorneys a realistic view of the potential results of the dispute, which allows them to approach alternative dispute resolution with an impartial eye. In doing so, the parties can then move to expediently and

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[143] For example, the managers and attorneys could be given various scenarios (both favorable and unfavorable as to the corporation) as to what may happen if they went through with litigation. Moreover, studies have shown that biases may be mitigated when people are told to list the weaknesses of their own case. Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, *11 (1999).

[144] *See* e.g. Marc T. Boccaccini et al., *I Want to Apologize, But I Don't Want Everyone to Know: A Public Apology as Pretrial Publicity Between a Criminal and a Civil Case*, 32 L. & PSYCH. REV. 31 (2008) ("Lawyers advise their clients about whether to give an apology, whether to request an apology, and how to respond to an apology.").

[145] *The Corporate Counsel Section of the New York State Bar Association Report on Cost-Effective Management of Corporate Litigation*, 19 AM. J. TRIAL ADVOC. 11, 30 (1995).

inexpensively handle their legal issues through alternative dispute resolution.[146]

V. CONCLUSION

In the eight-year litigation battle, Mattel and MGA both took on the mentality of their young customers. However, as adults, they should have known that the "But she started it!" argument is rarely a good excuse. The parties should have evaluated the contract and negotiated a dollar figure that would have compensated Mattel for any resources, materials, and ideas that came from and were developed during Bryant's time there. The parties should have also focused on how they could help each other achieve success. However, multiple mistakes in the parties' battle led them to miss the boat to a smooth sail down the path of alternate dispute resolution. Although because of flawed decision-making there is usually only one winner (or no winners), a well-thought-out plan and cooperation could have led to the success of both parties. Unfortunately, it is highly unlikely that Barbie and Bratz will be friends in this lifetime, but perhaps both can grow wiser with age.

[146] See Part IV.A for an explanation of alternative dispute resolution.