Writing is often the process by which you realize that you do not understand what you are talking about.
-- Shane Parrish

In the creation of a book with such an expansive goal—summarize all franchise and distribution law decisions from August 1, 2018 through July 31, 2019—the authors found that, despite their collective almost four decades of practice, there was more to learn. And learn they did. The authors searched for, reviewed, and summarized cases from Westlaw and CCH’s Business Franchise Guide as the primary sources, with a few cases pulled from the Trademark Trial and Appeal Board or directly from the docket if not otherwise available. The decisions themselves stretched the full range of topics—sometimes languishing on the details of a standard default judgment, but other times somersaulting through lower court decisions and appellate court reversals and remands or documenting the latest battle in a long-running war between litigants.

The U.S. Supreme Court issued only a few decisions that resonated in franchise and distribution law. Justice Kavanaugh issued a unanimous decision in Henry Schein, Inc. v. Archer & White Sales, Inc. (Chapter 8), which held that an arbitration provision that delegates the question of arbitrability to an arbitrator requires the initiation of an arbitration and an arbitration award, even when the question raised seems wholly groundless. More interesting from that decision is the remaining open question of whether the parties in fact delegate the question of arbitrability simply by incorporating the Rules of the American Arbitration Association. Also, during this Reporting Period, Justice Kagan, on behalf of the majority in Mission Product Holdings, Inc. v. Tempnology, LLC (Chapter 5), determined that a debtor cannot reject a contract in a bankruptcy proceeding and treat it as rescinded; the non-debtor party to a rejected contract retains its same rights. And, in Tennessee Wine and Spirits Retailers Association v. Thomas (Chapter 3), Justice Alito delivered the 7-2 majority opinion that the Dormant Commerce Clause barred
Tennessee’s protectionist law that required new alcohol distributors and sellers to wait two years to get a license in the state.

Antitrust claims remained an important area to monitor as courts continued to wrangle with treatment of franchise agreement non-competition and non-solicitation covenants that bar franchisees from recruiting each other’s or the franchisor’s employees (“no-poach” clauses). Following the cases that erupted in the prior year, like Butler v. Jimmy John’s, the U.S. Department of Justice issued a Statement of Interest on the issue and decisions such as Ogden v. Little Caesar Enterprises, Inc. (Chapter 6) reviewed the alleged antitrust violation applying the “rule of reason” approach and not the “quick-look” urged by Butler. As this issue works its way through the lower courts, it will be interesting to see what appellate courts will do.

Neither the courts nor the federal agencies have come to a conclusion on the question of joint employer liability that has plagued the franchising community since 2015. During the Reporting Period, the Domino’s Pizza decision (Chapter 7) appeared to be the “new” order, finding no franchisor liability for a franchisee’s employees without evidence of direct and immediate control. Then, the National Labor Relations Board issued a contradictory decision in Browning-Ferris but then withdrew it subject to the current administration’s proposed rule-making. Regardless of the existence of direct or indirect control, decisions involving Wendy’s and Kiddie Academy franchise systems (Chapter 7) showed the facility of making sustainable allegations that can survive a Rule 12(b)(6) challenge. Relatedly, parties continued to dispute the parameters of what distinguishes an independent contractor from an employee (SuperShuttle DFW and Jan-Pro cases, Chapter 7).

Continuing its reign as the critical issue for so many companies, data privacy laws and concerns were highlighted in Sekura v. Krishna Schaumburg Tan, Inc. (Chapter 6), where the plaintiff survived a motion to dismiss her biometric data (fingerprints) privacy claim under state law after it was disclosed by a third party.

Finally, significant updates came in from around the globe, although the most notable is likely the start of reported decisions and enforcement actions under the European Union’s General Data Protection Regulation, including a fine to Google LLC in excess of $55 million. (Chapter 9). The resulting developments and supplemental interpretations of the regulation’s scope signal caution for international franchise systems.
certainly, but even more so for those who may find themselves covered by the regulation’s broad language and reach.

For each of the reviewed decisions, the authors included fact highlights and the crux of the legal analysis. Where cases encompassed multiple legal theories, the reader may find the case listed in multiple chapters or under one chapter with a cross-reference to the full case description in another chapter or section. The summaries do not contain every significant fact, and the authors encourage the reader to use the provided citations to pull the full decision for review and to check both the history and any more recent activity to confirm the procedural posture of the case and that it remains good law. The reader should also use discretion, and certainly review the actual text of the decision, before relying on these summarized decisions as persuasive or precedential because the summaries do not reflect whether the court considered the decision “unpublished.”