"NEW PRIME" AND THE GIG ECONOMY

by Rick Bales, Ohio Northern University College of Law

At first blush, the *New Prime* case appears narrow since the Federal Arbitration Act exclusion it relies on has itself been interpreted narrowly as applying only to transportation workers. However, I suspect that the real significance of *New Prime* will be on Uber and Grab drivers and other gig-economy workers who may cross state lines in moving people and delivering goods such as ready-made food.

The FAA Section 1 exclusion at issue in *New Prime* provides: "... but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." In *Circuit City v. Adams*, 532 U.S. 105 (2001), the Supreme Court restricted the Section 1 exclusion to transportation workers, reasoning (incorrectly, in my opinion) that the reference to seamen and railroad workers was intended to narrow the scope of the exclusion. I believe a fairer reading of the exclusion would have focused on the broadening word "any" and to the reference to interstate commerce. Though "interstate commerce" was interpreted narrowly when the FAA was enacted, the Court has significantly broadened the clause since then and, indeed, interprets the clause in Section 2 — the clause defining the scope of the FAA as a whole — far more broadly. Instead, the Court split some pretty fine hairs to find that "interstate commerce" should be interpreted narrowly in the Section 1 exclusion but broadly in Section 2.

Be that as it may, Circuit City has led lower courts to engage in some bizarre line-drawing in trying to define who is excluded as a transportation worker engaged in across-state-lines commerce. Courts agree that truck drivers who move goods from one state to another are included in the exclusion and that airline pilots and flight attendants moving goods and cargo are included, but beyond that the courts are in disarray. Some courts, for example, have found that workers who transport people in interstate commerce are different for purposes of the FAA than workers who transport goods.

As Lise Gelernter has pointed out, this makes no sense. Someone (such as an Uber driver) who transports a person across state lines for pay is engaging in "interstate commerce" — even with *Circuit City*'s narrow reading of that clause — the same way as someone transporting goods. Whether an airline pilot is engaged in interstate commerce should not turn on whether there is cargo in the hold in addition to passengers in the seats, or on whether passengers have

checked suitcases. For those courts that distinguish between people and goods, what about the Uber passenger who packs a display case full of jewelry samples that she intends to sell at her destination? A passenger with "goods" such as clothing and toiletries in her suitcase? A passenger with a phone and other minor "goods" in her pocket?

Eventually, lower courts should coalesce around an understanding that transporting people across state lines for profit is indistinguishable, for purposes of the Section 1 exclusion, from transporting goods. Once that happens it will be much clearer that Lyft and Uber drivers — at least the ones driving near state lines — are covered by the exclusion, as are the on-demand workers who deliver other items across state lines. Many gig-economy companies to date have labeled their drivers "independent contractors" in an attempt to avoid wage-and-hour and other employment laws. *New Prime* makes it clear they won't be able to use that label to force their drivers into arbitration.