OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: THOMAS RALEIGH, CHAPTER 7 TRUSTEE FOR ESTATE OF WILLIAM J. STOECKER, Petitioner v. ILLINOIS DEPARTMENT OF REVENUE

CASE NO: 99-387 c-1

PLACE: Washington, D.C.

DATE: Monday, April 17, 2000

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IN THE SUPREME COURT OF THE UNITED STATES

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THOMAS RALEIGH, CHAPTER 7 :

TRUSTEE FOR ESTATE OF WILLIAM :

J. STOECKER, :

Petitioner :

v. : No. 99-387

ILLINOIS DEPARTMENT OF REVENUE :

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Washington, D.C.

Monday, April 17, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

ROBERT RADASEVICH, ESQ., Chicago, Illinois; on behalf of the Petitioner.

A. BENJAMIN GOLDGAR, ESQ., Chicago, Illinois; on behalf of the Respondent.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondent.

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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 99-387, Thomas Raleigh v. the Illinois Department of Revenue.

Mr. Radasevich.

ORAL ARGUMENT OF ROBERT RADASEVICH

ON BEHALF OF THE PETITIONER

MR. RADASEVICH: Mr. Chief Justice, and may it please the Court:

The issue in the case before the Court this morning is whether taxing authorities should be subjected to shoulder the same burden of persuasion as other creditors in bankruptcy to prove the allowance of their claims. We think it's essential, in resolving that question, to note that the validity of claim under State law is not the same as the allowance of a claim under the Bankruptcy Code and under the Bankruptcy Act which preceded the code. This Court's prior decision in Vanston is illustrative of that dichotomy.

Bankruptcy is fundamentally a process which realters and restructures debtor-creditor relationships. When matters of State law giving rise to rights between parties are at odds or are inconsistent with policies or procedures underlying the Bankruptcy Code, those aspects

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of State law give way.

We argued in our brief that the general practice under the Bankruptcy Act was to require taxing authorities, like all other creditors, to shoulder the burden of persuasion to establish the allowance of their claims.

QUESTION: Now, the respondent disputes that, Mr. Radasevich. He says there really wasn't -- there was authority on both sides and it simply wasn't well-established.

MR. RADASEVICH: We recognize in our moving papers, Your Honor, that there was aberrant authority that took the position that taxing authorities did not bear the burden of persuasion on their claims.

QUESTION: There was no decision from this Court.

MR. RADASEVICH: Correct, Your Honor.

QUESTION: So that you characterize as aberrant one side rather than the other. What is your basis for that?

MR. RADASEVICH: The basis, Your Honor, is the decisions that come down and the volume of the decisions that came down on the side of the equation that taxing authorities bear the same burden. The statements in Collier's which this Court recognized in Kelly as an

authoritative treatise as to what the standard of pre-code practice was, with no indication of any alternative viewpoint, took the position that the burden -- that taxing authorities bore the burden of persuasion on tax claims.

When Congress enacted the Bankruptcy Code of 1978, the legislative history indicates that it gave careful consideration to the treatment of tax claims in bankruptcy estates. The legislative history that we cite in our brief, I believe on page 16, indicates that Congress was concerned about the interplay between creditor rights of ordinary trade creditor variety, consensual trade creditors, the interests of the debtor, and the interests of taxing authorities

QUESTION: Mr. Radasevich, what was the head count of cases on your side versus those on the other side under the previous legislation?

MR. RADASEVICH: Many of the cases that were cited in the appellant's brief we don't believe stood for the proposition that the taxing authorities bore the burden of persuasion.

QUESTION: How about Judge Posner's opinion on B-8 of the appendix? He sets forth the cases that are in your favor, but -- which he acknowledges are a majority, and he says the Third and Fourth Circuits have reached an

opposite conclusion. He cites Landmark.

MR. RADASEVICH: That is correct, Your Honor. There were decisions on both sides of the equation. We do not take the position that there weren't decisions on both sides of the equation. What we argued in our briefs was that what appeared to be the majority view under the Act, and which Collier's thought was a majority view under the Act, was that taxing authorities bore the same burden of persuasion as other creditors. Whether --

QUESTION: But then we --

MR. RADASEVICH: Excuse me.

QUESTION: -- in that mixed picture I think would have the obligation to decide which is the better view, since we're not bound by one side or the other of that pre-code split. There is nothing definitive earlier, so shouldn't the proper role for this Court be to decide what is the better position?

There is -- the code itself is totally silent on this issue, is it not?

MR. RADASEVICH: Yes. The code and the act before it were silent, Your Honor, and we do agree that because there was no decision from this Court under the Act it's proper for this Court to look at the rationale of placing the burden either on taxing authorities or on the objecting party under the Bankruptcy Code.

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And if the Court determines that there wasn't a predominant practice under the Act, so that it was -- Congress was deemed to have accepted that practice under the code, certainly practice under the Act and the legislative history under the code is illustrative of the concerns that Congress had, and I think it's helpful to this Court in reaching its decision as to where the burden of proof should lie.

QUESTION: Well, wouldn't we normally look to State law for the substantive law giving rise to any claim? I mean, is that what we normally do?

MR. RADASEVICH: Yes, Your Honor.

QUESTION: And if the State law provides that the burden of proof is on the taxpayer, why wouldn't we follow that, or vice versa?

MR. RADASEVICH: The validity of claims under nonbankruptcy law is not the same as the allowance of those claims in the bankruptcy estate. If the Court hearkens back to its Vanston decision, in Vanston what the issue was was whether interest on interest was due in an indentured bond situation.

What the Court found was that because the Bankruptcy Code --

QUESTION: Bankruptcy Act.

MR. RADASEVICH: Bankruptcy Act. Excuse me,

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Your Honor. Since the Bankruptcy Act changed the relationship of the parties with respect to the debtor's ability to make payments, that allowing the creditor to obtain interest on interest, which was -- the Court assumed was valid under the prevailing State's law, it's inequitable to other creditors of the estate. So the Court didn't focus on whether the entire claim of the creditor was invalid. It focused on a small aspect of the claim.

QUESTION: Well, but the code -- the Act gives tax claims priority, which indicates a certain preference, in a sense, for paying the taxes.

MR. RADASEVICH: Absolutely it does, Your Honor. The Bankruptcy Code gives taxing authorities benefits in several different areas, and the legislative history that we cited indicates the best result of Congress' concern about the interplay of taxes and creditor rights and rights of bankrupt debtors.

But this Court also recognized in Whiting Pools and in Energy Resources that just because taxing authorities or other creditors are given priorities, are favored in one portion of the Act, does not necessarily mean they're favored in others, and when Congress attempted to balance the interests of taxing authorities, other creditors, and the debtor, it did so by giving

taxing authorities and banks tier priority.

QUESTION: Well, one might argue that the view of the Seventh Circuit here does not really favor taxing authorities in that sense. It simply says, we're taking the substantive law from State law in each case and that the burden of proof in this case is a matter of substantive law. That's what the case is really all about, isn't it?

MR. RADASEVICH: Yes, Your Honor. That is what Judge Posner held in his decision. We respectfully disagree that in filling a gap, essentially, in the text of the Bankruptcy Code, that this Court is required to adopt State law.

QUESTION: You don't deny, I take it, that that is a part of the State law of Illinois, the burden of proof.

MR. RADASEVICH: Burden of proof were matters of substantive law under Erie, yes, Your Honor.

QUESTION: I guess the question is, is whether we in effect would be chipping away at the concept of the validity of the claim if we did not recognize the burden-of-persuasion rule, and the argument, I suppose, that we would be chipping away at it, that we really would not be recognizing validity 100 percent, is the argument that the burden of persuasion is so important to the Government's

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claim that you really cannot conceive of the claim in traditional terms without conceiving of it as one upon which the taxpayer has the burden.

And the argument for that, as I understand it, is, the taxpayer is usually the one who has the most easy access to the facts, and the easiest access to the evidence upon which ultimately the tax liability is going to depend, so if you take that argument, that by removing the burden of persuasion you really are taking away an element that goes very importantly to the validity, what is your response to that?

MR. RADASEVICH: I think that is precisely the argument of the Government, Your Honor, and our response is that bankruptcy historically alters debtor-creditor relationships as a matter of fact in every single case, and burdens of persuasion which exist outside of a bankruptcy context and are meant to allocate risk, are designed to allocate risk between litigants, we don't think apply in a bankruptcy context when parties in interest are different.

In a bankruptcy context this Court has found repeatedly it transfers claims against the debtor, legal claims against that debtor, to equitable claims against assets which comprise a bankruptcy estate. It's no longer the Illinois Department of Revenue litigating with Mr.

Stoecker. They have the ability to continue to do that outside of bankruptcy, like most taxing authorities, because tax claims by and large, unless they're extremely stale, are nondischargeable under section 520(p) irrespective of whether a proof of claim is ever filed or allowed.

QUESTION: True, but I mean, I'm not sure that that gets to the, really to the heart of the point, that by adjusting, we'll say, the relations of fairness as between the original parties, the original taxpayer and the Government, you are in fact, or you would in fact, under the Bankruptcy Code, be changing the nature of the claim because you simply cannot understand the claim except in terms of who has the burden.

If the Government has the burden, it doesn't have that much of a claim because it simply doesn't have access to the means of showing it, and so it seems to me that the meat of their argument really is not affected by the fact that we have a slight shift in the actual parties to the relationship here.

The meat of their argument is, the claim itself would be changed if you changed the burden, regardless of who happens to be fighting about it at a given time, and I'm not sure that you really responded to that.

MR. RADASEVICH: Your Honor, if you start with

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the presumption that the Government's claim is based -- their tax claim is based upon something, often their internal audits and internal assessments, if we look at what happens when they file a claim under section -- under the Bankruptcy Code, and the prima facie validity of that claim that ascribes under section 3 -- under Bankruptcy Rule 3001(f), it's not the Government's initial burden at that point to do anything.

The burden's on whoever the objecting party is, be it the taxpayer, a creditor, a Chapter 7 bankruptcy trustee, or a creditor's committee, to introduce an argument, evidence of an argument of equal probative value, which is the standard that a lot of courts talk about when they talk about displacing the prima facie validity of the claim in order to shift the -- to make the creditor, the taxing authority come up with additional evidence to prove its claim, so it --

QUESTION: Mr. Radasevich, I think you're now talking about the distinction between the burden of coming forward, which you concede that the taxpayer would have, and the ultimate burden of persuasion, but it is the ultimate burden of persuasion that's critical here, and why isn't it part and parcel of the substantive right? That is, this is not just any general rule about burden of persuasion. This is a rule that is stuck together with a

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certain kind of claim.

This is a rule not for claims generally, but for tax cases, so we tend to think of built-in statutes of limitations, rules about processing, if you will, but that go together, that we have in other contexts called part and parcel of the substantive right, and so it doesn't answer that question to say, well, the taxpayer would have a burden of coming forward.

MR. RADASEVICH: Justice Ginsburg, I think that the burden of proof attendant to tax claims is as much substantive of those claims as the burden of proof on any other claim.

Congress and State governments, State legislatures have decided that because of certain policy reasons the burden of persuasion on an assortment of different tax claims should be borne on the taxpayer rather than the taxing authority. Those policy reasons are generally recordkeeping requirements, access to documentation, and knowledge about the underlying tax claim. Those interests are not disserved by placing the burden of persuasion on a taxing authority in a bankruptcy estate because of the way claims are adjudicated in bankruptcy.

Because the taxpayer has to come forth with credible evidence, hopefully supported by records, in

order to counter the prima facie validity of the claim, we think those same purposes are served.

For example, in Landbank, the decision that holds that the burden of persuasion is on the taxpayer, on the objecting party in bankruptcy, in that case the taxing authority filed a proof of claim and based upon an estimated valuation of bad loss, bad debt losses, the objecting trustee said no, you should figure -- you should determine bad debt losses based upon the actual accounting method, but the Court's opinion indicates that nobody had any records of what the bad debt losses under the actual accounting method was.

In that instance, the objecting creditor failed to rebut the presumption of the taxing authority's case. The taxing authority's case in Landbank, the taxing authority would have won even if the burden of persuasion would have been on the taxing authority, because the debtor, without adequate records, without justifiable evidence to rebut the presumption, can't overcome the validity of the tax claim.

QUESTION: Well, did the objector here introduce some sort of evidence of the kind you're talking about? Somewhere in these opinions one of the courts says there's virtually no evidence on the subject either way.

MR. RADASEVICH: The Illinois Department of

Revenue's evidence consisted of the notice of penalty or liability that was issued by the --

QUESTION: I mean, what about the objector? You say that person at least has to come in with a plausible argument.

MR. RADASEVICH: Yes, Your Honor.

QUESTION: Was that done here?

MR. RADASEVICH: Yes, Your Honor. The evidence that was submitted by -- on behalf of the trustee was an opinion of counsel of the target company, Chandler Enterprises, that the subject transaction was exempt from taxes as an occasional sale.

They also have the certificate of exemption from the seller indicating that it had only sold one airplane, ever, and it was an -- this was an exempt sale. It also had the testimony of the lawyer supporting those arguments, and the testimony of Mr. Prewitt from the leasing company supporting those arguments.

What the Illinois Department of Revenue had, as indicated by Brenda Thompson, her testimony, was, when Chandler never responded to the notice of tax liability against it because it was only a shell and its principal was in bankruptcy, it checked with the Illinois Secretary of State and found out that Mr. Stoecker was an officer and director, as was an individual named Larry Pluhar.

Based upon that evidence and that evidence alone, when they didn't respond to letters they issued notice of penalty and liabilities against Mr. Stoecker and Mr. Pluhar with zero evidence that they were, in fact, responsible or, in fact, willful, so we believe that the evidence that we offered, which was the opinion letters and the certificates and the testimony, was sufficient to rebut the presumption of the validity -- was at least equal to the probative value of the --

QUESTION: Why didn't you just call him to the stand, Stoecker, and say, look, did you get the letters to the lawyer? Yes. Did you think you were liable for tax in Illinois? No. Okay, thank you very much, and then you would have won.

So why -- I mean, it -- what Justice Souter said, I don't see that it makes much difference where the burden of proof is, frankly, and this seems like a case that illustrates that, and on the state of mind, where it's willful, I mean, you'd think that Mr. Stoecker was the best -- is the best witness in respect to that, and if he doesn't show up, you begin to get suspicious.

MR. RADASEVICH: Your Honor, Mr. Stoecker is currently a guest of the Federal Government, residing at a facility in Wisconsin, and --

(Laughter.)

QUESTION: I didn't know that.

MR. RADASEVICH: During the trial --

(Laughter.)

QUESTION: But it might be easier to locate him.

(Laughter.)

MR. RADASEVICH: During the trial, Your Honor, his deposition was taken and he asserted his Fifth Amendment rights. In fact, the Illinois Department of Revenue attempted to assert the inferences arising from the assertion of a Fifth Amendment right against the trustee. That did not fly, because the trustee is not the debtor. We are fundamentally not the taxpayer. We are a Chapter 7 trustee operating for the benefit of our creditors.

QUESTION: Isn't it the case that at least the trial court here said, yeah, this is one of those cases where the burden of proof does matter. I'm in equipoise. They have what -- a good case, the other side has a good case. There were gaps. Given that situation, I am deciding this case on the basis of the burden of persuasion. Isn't that so?

MR. RADASEVICH: Actually, Your Honor, the trial court Judge Squires found that under State law the burden of persuasion was on the taxing authority, and the Illinois supreme court came down with a decision during

the middle of our case which clarified that point, and found that the burden of persuasion was on the taxpayer.

Judge Squires, then affirmed by Judge Anderson, found that the burden of persuasion on a claim objection, on the allowance of a claim in bankruptcy fell with the trustee. The court found that we rebutted the presumption.

The court did not make the alternative finding that if the burden was on the taxpayer --

QUESTION: There was some judge in this case who said, this is a case where there are gaps in the evidence, and it's one of those cases where the burden of persuasion is determinative. Now, which judge said that?

MR. RADASEVICH: Judge Anderson, Your Honor. Judge -- I'm -- excuse me. Judge Squires, Your Honor.

QUESTION: And he was what?

MR. RADASEVICH: He was the bankruptcy judge, and he found that the evidence that we submitted was sufficient to rebut the presumption. In --

QUESTION: Perhaps this is an unfair question, but was it only after the Illinois supreme court decided that issue that you decided this was a matter of Federal law?

MR. RADASEVICH: No, judge -- Your Honor. Excuse me. No, Justice Stevens.

(Laughter.)

MR. RADASEVICH: We have -- these issues have been hanging around in this case since we started litigating in 1992.

QUESTION: So you had two arguments before, and now you have only one?

MR. RADASEVICH: Your Honor, in the beginning we had a host of different arguments.

(Laughter.)

MR. RADASEVICH: We're down to one.

QUESTION: I noticed you cited in your brief the Vanston case in 1940, 1946, something like that, and you don't cite the Butner case which the -- or you didn't talk about it in your oral argument, which the respondent relies on. Can you tell me, why didn't the Court -- this Court in Butner cite Vanston?

QUESTION: You should ask me, not him.

MR. RADASEVICH: Yes, I'm trying to --

(Laughter.)

QUESTION: Well, isn't the answer that it was that Vanston was pre-amendment of the Bankruptcy Code?

MR. RADASEVICH: I don't think so, Justice Kennedy. What was going on in Butner was whether there was a Federal interest underlying the need to have a uniform rule around the country about what a secured

lender has to do once bankruptcy is filed to perfect a security interest in rents.

The Court found that that, much like whether a -- how you establish a contract claim in Connecticut, or how you do a tort claim in Arizona, is the constituent elements of the rights of parties are determined under State law. The Court found that the rights of a secured lender under State law to obtain rents on property should be left to State law. There's no overriding Federal interest to make it otherwise.

You compare that case with the Court's decision in -- so it didn't need to discuss Vanston because there wasn't an impact on creditors. You converge that case with a case like Rash, where the Court determined that in order to determine the -- what constituted value of collateral under section 506 and a cram-down under section 1335.

You don't look at what the secured creditor would get under State law, which is the foreclosed value of the collateral. You look at it from the debtor's perspective in bankruptcy court and you determine that it's important for uniformity and predictability cases that we have a uniform rule that should be the fair market value of the collateral and not -- without reference to State law.

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QUESTION: Is -- I notice that the Government on page 15 of their brief cites a large number of cases that really come out of the amici briefs of the States. They have four where they say burden of proof is shifted. It isn't always the creditor, and they say there are Tyler cases, there are laches cases, there are accord and satisfaction and usurious debt cases, so there are a bunch of them where really the burden is not on the creditor, and this is just one more of those.

Now, what's your response to that? Are those accurate, and if they are accurate in your opinion, why isn't this just one more of those?

MR. RADASEVICH: Your Honor, I think the cases cited -- excuse me. I think the cases cited by the Department and the amici in those -- in that regard are affirmative defense cases. You assume that the claim is valid. You introduce an affirmative defense of statute of limitations. You assume the debt is -- that the instrument says that interest was supposed to be at this rate. You bring in the affirmative defense that that rate is usurious under Illinois law.

QUESTION: Is the Truth in Lending Act an affirmative defense case, too? I can see the others. You'd argue for the simple rule, you'd say, all right, if it's an affirmative defense, the burden shifts, otherwise

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not, and they're arguing for the simple rule, let's look to see what it is under State law and treat it the same.

MR. RADASEVICH: I'm not looking to -- strike that. The trustee is not looking to establish a rule going to who should have the burden on various different types of affirmative defenses without looking at what the underlying case is.

What we are looking for is a rule that says, creditors, when it comes to proving the prima facie evidence, the prima facie validity of their claim, can rely on their proof of claim. When it comes to a situation where that claim is rebutted, taxing authorities in bankruptcy should be treated no differently than any other creditor when it comes to the allowance of their claim, because Congress -- there's no indication that Congress thinks that it should.

When Congress thinks that they need an extra time period to file burdens of proof, or file proofs of claim, because they have an awfully hard time getting their records together and because they tend to be bureaucratic beasts, they give them additional time periods to file proofs of claim. They give them dischargeability notices. They give them priorities of claim.

But the eight groups of creditors that have --

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or the seven groups of creditors that have priorities above taxing authorities all have to prove their claims. When this Court in --

QUESTION: Of course, the Congress didn't say anything about affirmative defenses, either.

MR. RADASEVICH: It did in section 547, Your Honor, which deals with preferences, and there's a burden of proof allocation in section 547 of the Bankruptcy Code where Congress says that basically the trustee or the plaintiff has the burden of persuasion on the prima facie elements of a preference claim, and it's up to the defendant to have the burden of proof -- they never say persuasion -- burden of proof on the subsection (c) matters which are in the nature of affirmative defenses, that it was in the ordinary course of business, et cetera.

QUESTION: You say that the other creditors have to prove their claims. That's purely accidental. I suppose you could have another State law that gave some creditors other than the taxing authority the same kind of benefit that you're fighting here. In other words, suppose there is a State law that does not require another creditor to bear the burden of proof. You would likewise disallow that one.

MR. RADASEVICH: We would likewise place the burden of persuasion on that creditor in bankruptcy to

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establish its claim, yes, Your Honor.

As it comes to pass, our research didn't indicate many other situations where creditors have burdens of proof.

QUESTION: Are there any other? I was trying to think of one to give you a hypothetical, but I --

MR. RADASEVICH: There was a case --

QUESTION: There is a Due Process Clause that seems to stand in the way of that, except for taxing authorities, for some reason.

MR. RADASEVICH: There are presumptions that arise in certain Federal taxing concepts. There's one under the Black Lung Act, something called the true doubt rule, that if somebody works in the mine for 40 years and gets lung disease, pretty good bet it's a result of him working in the mine.

The Court, though, in a decision the name of which escapes me found that that true doubt presumption doesn't hold in cases under the Administrative Procedures Act, because the Administrative Procedures Act says that the burden of persuasion should be on the claimant.

Burden of procedures, or the Administrative Procedures Act, Administrative Review Act is different than bankruptcy. Bankruptcy is not a venue. Bankruptcy's a process, and that process requires that all creditors,

taxing authorities and otherwise, bear -- shoulder the same burden of persuasion to establish their claims.

I would like to reserve the balance of my time, please.

QUESTION: Very well, Mr. Radasevich.

MR. RADASEVICH: Thank you.

QUESTION: Mr. Goldgar.

ORAL ARGUMENT OF A. BENJAMIN GOLDGAR

ON BEHALF OF THE RESPONDENT

MR. GOLDGAR: Mr. Chief Justice, and may it please the Court:

I'd like to begin by clearing up one area of potential confusion, and that has to do with the difference between, if there is a difference between the validity of a claim and the allowance of a claim. Mr. Radasevich said that validity is not the same as allowance. That is both true and untrue.

Allowance can mean more than validity, certainly. There are reasons under section 502 of the code for disallowing a claim that have nothing to do with its validity, but validity is itself a reason for disallowing a claim. It was, in fact, the reason why the trustee in this case challenged the claim. It was the trustee's assertion that the Department of Revenue's claim was not valid under State law. Under Illinois tax law, he

contended, we did not have a claim. In that instance, validity is indeed the same as allowance.

Now, to make matters more complicated and talk about how allowance is used in the Vanston case, under the Act, as opposed to under the Code, allowance meant something else again. It not only meant allowance in the sense that it's used in section 502, but it also incorporated notions of equitable subordination, so that the Vanston case -- and I can't speak to why it wasn't cited in the Butner decision, but it was cited in the opinion that Justice Stevens wrote in Grogan v. Garner.

In Vanston, the Court first observed that the validity of a claim -- I believe they termed it existence, but that's really the same thing. The existence of a claim is a matter of State law except where there is overruling Federal law, but the Court went on to say that essentially the equivalent of equitable subordination applied, and that is that it was unfair to allow these particular creditors interest on interest at the expense of other creditors, so in this case we are talking about allowance. We are also talking about validity.

The trustee in this case is asking the Court to do something that we contend is pretty radical and that is, in the face of congressional silence and ignoring the vital interest that States have in the integrity of their

tax schemes, he's asking the Court essentially to fashion a Federal common law burden of proof only, apparently, for tax claims and only in bankruptcy. Under his rule, tax claims would be decided differently in bankruptcy court than in State court.

QUESTION: I thought, Mr. Goldgar, that Mr. Radasevich had said if there were other claims that were like the tax claims, his rule would be the same, but he said on inspection there weren't many, that most of the others were affirmative defense cases.

MR. GOLDGAR: Yes, he did say that, as a matter of fact. I stand corrected. Although if there are no other burdens of proof that are similar, we believe the rule he is asking for would only have an impact on tax creditors.

QUESTION: Are there? He didn't fully answer that. He said there weren't many, but he -- and he gave the black lung benefits.

MR. GOLDGAR: I don't know of any myself.

QUESTION: You don't know of any.

MR. GOLDGAR: That doesn't mean there aren't any, but I couldn't name any for you now.

Under his rule, essentially what happens is that State tax law is changed, altering the rights of really a single creditor, a single class of creditors to the

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benefit of all other creditors in bankruptcy, and that class of creditors that is disadvantaged is, in fact, a class of creditors that is ordinarily favored in bankruptcy.

QUESTION: But of course your argument assumes that the burden of proof, or the burden of persuasion is part of the substantive law that governs the claim.

MR. GOLDGAR: Yes, that -- we do assume that. We think that's an accurate statement of the law.

QUESTION: But you're -- I mean, I don't think it's fair to say that the trustee here is asking to single out for some discriminatory treatment one particular class of creditors. The fact is, this is the only class of creditors I know of that doesn't have to prove its claim.

MR. GOLDGAR: Well, I don't --

QUESTION: The black lung cases, maybe that's another, but --

MR. GOLDGAR: Well, let me --

QUESTION: The argument being made is, this is a very strange provision that does not exist in the common law normally and the purpose of it is to enable the Government, which normally does not have in its control the documents necessary to prove its case, to collect taxes that are due, and that when you shift over into a bankruptcy context the situation changes. It's not the

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Government -- the other creditors are no more in control of the necessary documents than the Government is.

MR. GOLDGAR: Let me answer that a couple of ways. The first is, tax creditors do have to prove their claims. We had to prove our claim here. We proved it the way State law required that we prove it. We proved it with the certified record of our proceedings, which in this instance, with an unavailable taxpayer, essentially --

QUESTION: That's playing word games.

MR. GOLDGAR: Well --

QUESTION: I mean, you had to prove it the way the State law said you had to prove it, which is not the way everybody else has to prove it, that is, by a preponderance of the evidence, right?

MR. GOLDGAR: That's the burden of proof, though, that attaches to their claim, whatever it may be. This is the burden -- and therefore that's --

QUESTION: But this is a distinctive burden of proof that has been singled out for tax claims, and the argument being made is, there are good reasons for that, but those reasons don't apply in bankruptcy, and therefore this particular very weird element of, you don't have to bear the burden of proving your claim, should not be carried over into bankruptcy law, and there were many

courts that came out that way under the old Bankruptcy Act, and Collier on Bankruptcy, the only bankruptcy authority I ever used, agreed with that.

MR. GOLDGAR: Well, some courts came out that way and many courts did not. I think what the trustee is really suggesting here is that in bankruptcy we can end up doing a kind of ad hoc balancing and determine whether we like or dislike the substantive law attendant to a particular creditor's claim when we're deciding the validity of that claim.

In this instance it apparently, according to the district court, was simply deemed to be unfair to the other creditors to allow tax creditors to have the benefit of their burden of proof.

QUESTION: Yes, but that's -- look, he had very good answers to my questions. I was trying to think, just following up on what Justice Scalia says, it seemed to me fairly easy, this case, because it seemed like there are a lot of instances in which you go into bankruptcy and really it's not the creditor that has to prove the claim, it's somebody else, all right, just like this, and then every one of those he says, with a very few exceptions, maybe Tyler, is really not so. It's an affirmative defense. So I wonder if you can be borne out historically.

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And then he had -- his second answer was, look, when you shift the burden of proof in an ordinary nonbankruptcy context, obviously the taxpayer can go in and declare his state of mind, for example, or the records, but here it's not the taxpayer who's at issue. It's, let's say the widows and orphans who are the other creditors, and they have no easier access to that taxpayer than you do. You all start out with the same nonaccess or access, so why shouldn't you have to call Mr. Stoecker in just as you're saying they should have to call Mr. Stoecker in.

So if there's no tradition, and if the reason disappears, why should you win?

MR. GOLDGAR: We should win because -- well, for a couple of reasons. Because it is part of our claim. It is part of the substance of our claim.

QUESTION: Oh, no, I understand that's the conclusion, but the -- to get to that conclusion you're going to have to show some kind of history, tradition, or reason, and those were the parts that I wanted to hear your answer to.

MR. GOLDGAR: History or tradition or reason of the burden of --

QUESTION: The reason why, for example, although you have a good reason for saying the taxpayer should pay

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the burden where it's State v. Taxpayer, namely Taxpayer has the ability to keep the records, et cetera, you do not have that good reason where it's State v. Widows and Orphans, and the taxpayer is equally inaccessible to all of you.

MR. GOLDGAR: Well --

QUESTION: I'm not -- I just want to know what your response is to what I take to be his responses to what I asked.

MR. GOLDGAR: First of all, even if -- I don't agree that that is the particular playing field we should be on. I mean --

QUESTION: But still, I'm just curious what the answers are.

MR. GOLDGAR: But I take -- you know, for the sake of argument, even if the set of facts that Mr. Radasevich posits is true here, or even occasionally true, it's certainly not always going to be true. In many instances, if not most instances, the debtor-taxpayer is the objecting party in bankruptcy. In many instances when the trustee is the objecting party the trustee has the information.

This is the most sympathetic case for a trustee. We've got a Chapter 7 bankruptcy with insufficient assets. We have a trustee who's the bankrupt -- who is the

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objecting party, and a trustee who happens to have no records, despite efforts on both sides to get them, because we had a taxpayer who was under indictment and eventually convicted of a crime.

But that isn't always going to be the case. In most instances it won't be, and if the burden of proof is a legal rule, do we want bankruptcy courts making what are essentially ad hoc balancing determinations before we ever even get into the litigation of the claim.

QUESTION: I don't understand why you claim it's an ad hoc balancing. It's who has the burden of proof. I don't see that that's ad hoc balancing.

Let me ask you something else. The taxes that the State wants presumably are exempt from any debtor's discharge in bankruptcy, is that true?

MR. GOLDGAR: These would be nondischargeable, yes.

QUESTION: Right, so you could go after the taxpayer without ever making a claim in bankruptcy.

MR. GOLDGAR: Well, in this instance the taxpayer who, as Mr. Radasevich pointed out, is a guest of the Federal Government, and --

QUESTION: Presumably won't always be, and the State can go after him in the future.

MR. GOLDGAR: Well --

QUESTION: This is a nondischargeable debt.

MR. GOLDGAR: Two points about that. First, though nondischargeable, if it's disallowed in the bankruptcy, presumably that would mean that we have no claim. I don't imagine that we would --

QUESTION: But if you never made a claim through the bankruptcy proceeding, presumably the State can always go after the taxpayer.

MR. GOLDGAR: Well, in that event, Justice O'Connor, the Government is put to an impossible choice, because in that instance we either have to choose, apparently, between making our claim in the bankruptcy and suffering a different burden of proof than we would have if we made the claim in the State court, or waiting until the bankruptcy is concluded, in which case the assets have been distributed hither and yon, and --

QUESTION: Why can't you do both? I mean, if there is a different burden of proof, I mean, res judicata in a civil case doesn't cover in a criminal case because they're different burdens. I'm not sure you couldn't bring the second action even --

MR. GOLDGAR: Well --

QUESTION: -- if you lost the bankruptcy action at all.

MR. GOLDGAR: I'm not sure if we could or we

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couldn't. I think that raises difficult problems, but let's assume that we could.

QUESTION: Right. Don't hypothesize the worst. Be optimistic.

(Laughter.)

MR. GOLDGAR: Well --

QUESTION: Well, but a bankruptcy is not a criminal proceeding, so it's not a beyond the reasonable doubt.

MR. GOLDGAR: No, that's true, but still what happens is, and I don't think this can really be denied, the assets get distributed. The money is going to be distributed.

QUESTION: How much were we talking about? What was the --

MR. GOLDGAR: In this case, $911,000, almost $912,000. Mr. Stoecker I don't believe is going to have $912,000 any time soon.

QUESTION: So your point is, waiting till after could be more theoretical than real, because the chances that he would amass $900,000 --

MR. GOLDGAR: It could be a very long wait, and that at the same time that Congress has said that we should be a priority creditor and instead, if we have to wait, then we actually come after all the general

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unsecured creditors instead of before them. That's not a dilemma, that's not a choice that Congress has indicated we should be put to, not in a case like this.

QUESTION: What are your best historical or traditional examples, an example of an instance that isn't an affirmative defense, where Congress is silent, and where State law or some other law puts the burden not on the plaintiff or the creditor but somebody else, and that's followed into bankruptcy?

MR. GOLDGAR: I --

QUESTION: What are your -- yes.

MR. GOLDGAR: I don't know of anything that I could cite to you, Your Honor.

QUESTION: So this would be the only one.

MR. GOLDGAR: As far as I know.

QUESTION: In other words, for you to win, then, we're saying tax cases are special.

MR. GOLDGAR: No.

QUESTION: State tort tax cases are special, or we're --

MR. GOLDGAR: -- sorry.

QUESTION: Or we're saying if the State passes these burden of proof things in other areas they get followed into bankruptcy, too.

MR. GOLDGAR: Oh, yes, I would certainly say

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that. I mean --

QUESTION: Well, if that's so, why doesn't the State just have a law, say we always win, or, you know, a State --

(Laughter.)

QUESTION: -- would say, if it's in bankruptcy the burden shifts to the other side?

MR. GOLDGAR: Well, I certainly can't speak to that, but you know, perhaps that will happen one day, although it seems unlikely, but we're not asking for anything special. That's our point. We're -- we want what everybody else gets in bankruptcy. Everybody else gets their substantive rights under State law in deciding whether their claim is a valid claim under State law. That's what we want. If --

QUESTION: But you have a special preference outside of bankruptcy. I mean, it is weird. I don't know that the States could do what Justice Breyer suggested and simply in other fields, other than taxation, where we've allowed this. It is due process in taxation to put the burden on the taxpayer to show that he doesn't owe the tax. I seriously doubt whether it would be due process in other instances to say that this plaintiff wins unless the defendant can prove that the plaintiff doesn't have a cause of action. I think that's very problematic.

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MR. GOLDGAR: Well --

QUESTION: And the reason you have this special preference has nothing to do with what's up in the bankruptcy case, and the equities are so much different. You're not going after the taxpayer. You're going after his money. You're going after the widows and orphans, to put it tendentiously.

MR. GOLDGAR: Well, here the widows and orphans are banks, just to make that --

(Laughter.)

MR. GOLDGAR: So you know -- but again, what Your Honor is assuming is what the trustee is assuming, and that is, in bankruptcy suddenly everything changes and the trustee doesn't have the information.

QUESTION: Isn't some of the reason for the benefit given by State law to the taxing authority illustrated here, where apparently it took the State a number of years to learn that this $12-million airplane had even been sold?

MR. GOLDGAR: That's right. We didn't know about this taxpayer, and by taxpayer I mean Chandler, the corporation. We -- he had -- this corporation was, according to the indictment, a shell with no real business operations at all that was apparently used for the purchase of this plane and for nothing else, and there was

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no information available to us.

You know, what Mr. Stoecker would have said I don't know. This was a corporation that never paid any taxes, it was never registered with the State, so there was nothing we could do, so in many respects this is the most sympathetic case for the Government. There was no evidence available here, and yet there was a sale or purchase, both, of a $12.5 million airplane which was subject to Illinois use tax to the tune of a million dollars.

Now, if the burden of proof is on us to prove the elements of responsible officer reliability here, these people succeeded in what they were trying to do. They get off scott-free, no tax. The banks, not the widows and orphans, collect their money.

It's important to remember that we're still litigating the debtor's liability, and it's still the Government on the other side, and the Government still doesn't have the information, even though the situation is in bankruptcy. Ordinarily, lack of evidence is called a failure of proof. It's not a reason for shifting the burden of proof.

In many respects the trustee and any other creditors are better off in the bankruptcy court. If we were litigating this outside of bankruptcy, well, there

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wouldn't be a trustee, of course, but the other creditors would not get notice of this claim. We could go and sue for these taxes and not tell anybody but the taxpayer.

Here, they get notice. Here, they have standing to come in and complain about it. They get to reopen an assessment that was defaulted under State law and was final against this taxpayer, so they have many rights. They have many rights.

At bottom, this is an argument, we suggest, for amending the code. It's not an argument for imposing a common law burden of proof in the face of total congressional silence on this issue.

Unless there are further questions, thank you very much.

QUESTION: Thank you, Mr. Goldgar.

Mr. Wallace, we'll hear from you.

ORAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE RESPONDENT

MR. WALLACE: Thank you, Mr. Chief Justice, and may it please the Court:

Under our self-assessment and self-reporting systems of State and Federal taxation the traditional burden of proof on the taxpayer is not a peripheral matter. It's essential to the successful functioning of

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tax authorities and to providing an incentive for the maintenance of adequate records to enable fair determinations of tax liabilities to be made.

Now, the court of appeals was quite correct in pointing out that the code addresses burden of persuasion in a number of contexts but not with respect to burden of persuasion on tax claims, and referred to its silence as eloquent. Actually, there is perhaps something more than silence that implies an answer to this.

Tax claims arise in bankruptcy proceedings sometimes in the form of judgments that have been adjudicated by tax tribunals, whether State or Federal, but have not yet been paid, and sometimes as claims that have not been reduced to judgment, and in the section of the code, section 505 of title XI, entitled Determination of Tax Liability, Congress explicitly addresses the situation when a tax claim is reflected in a judgment.

As the court of appeals pointed out, section (a)(1), subsection (a)(1) of section 505, a provision which is cited in the briefs but not set forth in the briefs, does give the -- a bankruptcy court authority to determine the amount or legality of any tax except as provided in paragraph 2, and paragraph 2 of section 505(a) says that the bankruptcy court may not make that determination if the amount or legality has been contested

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before and adjudicated by a judicial or administrative tribunal of competent jurisdiction. Then that judgment is binding in the bankruptcy proceedings.

Now, two observations might be made about this in a search for congruity in administration of the bankruptcy proceedings themselves with respect to tax claims, first that by 1978, when these provisions were enacted in the code, it was very familiar where the burden of proof lies in these tax adjudications and Congress was comfortable in giving conclusive effect to those that have been adjudicated in a tribunal.

But the other, rather strong implication is that the bankruptcy court is being told it's bound by those determinations, but when those determinations have not been made by a tax tribunal, then the implication, it seems to us, is that the bankruptcy court should be acting as the surrogate for the tribunal that ordinarily makes these tax determinations and should try to reach the result that would otherwise be binding in the bankruptcy proceedings in the spirit of Erie Railroad v. Tompkins.

This is a question governed by tax law, whether State or Federal, in this case State tax law, and you try to reach the result that the tribunal that can speak authoritatively for the State government in this case which creates the tax claim would have reached.

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What petitioner is arguing for is a rule that would encourage the reaching of disparate results, depending on which tribunal is making the determination, a return to a pre-Erie kind of administration of the law, which would destroy congruity in the achievement of results here.

QUESTION: Mr. Wallace, it's not just Erie, is it? As I understand it, in choice of law generally the burden of persuasion would go with the substantive right, so if we were making a State-State judgment, and Illinois is applying the law of Indiana to a particular claim, with that law would go Indiana's burden of proof and not Illinois, so it's not just a vertical Erie, but a horizontal --

MR. WALLACE: Well, I'm just -- I'm talking about the spirit of Erie. Erie revolutionized our thinking about how tribunals should go about making determinations when they're really determining something that is law emanating from another jurisdiction. They should try to achieve the determination that that jurisdiction would have achieved through its normal processes.

It's just an analogy that I'm drawing. I'm not saying that Erie controls this case. What I am saying is that the petitioner is asking this Court to construe the

Bankruptcy Code to encourage disparate results, depending on which tribunal has made the determination, when Congress quite explicitly said that if it has gone to determination before the normal tax tribunals which apply the normal burden of persuasion in tax cases, that will be binding in the bankruptcy proceeding.

There should be some reason before we should read the companion provision, which says nothing about burden of persuasion, to encourage the bankruptcy court, when it has to step in as the surrogate for the normal tax tribunals, to reach different results by applying different ways of determining the tax liability.

In fact, occasionally bankruptcy courts, when there's a particularly complicated tax question, will lift the automatic stay, as they're authorized to do to enable a tax court proceeding to go ahead to a conclusion because they feel that the tax court can make a more accurate determination on a complex tax issue, and then under this provision that will be the binding determination for the bankruptcy proceeding.

So what's really being advocated here is an incongruity in reaching results with respect to tax claims, because they often come before the court with a preexisting, embodied preexisting judgment which Congress has taken no chances on here, but has said will be

binding, and it's barred the bankruptcy court from making any other determination with respect to the tax liability.

QUESTION: I'm not sure that's an incongruity. It seems to me quite Congress to say judgments are judgments. Are not other judgments accepted by the bankruptcy court, too?

MR. WALLACE: They are as very strong evidence of the claim and it's often argued that they're res judicata, but there's nothing in the code about other kinds of judgments. The code -- I mean, the fact that Congress explicitly said that the bankruptcy court is bound by tax judgments and is not to redetermine those does seem to, it seems to me indicate both a comfort with having tax claims decided under the ordinary burden of persuasion for their decision and --

QUESTION: But they'd be bound by other sorts of judgments on some issues which, if the -- if there had not been a judgment, and the issue were presented to the bankruptcy court, the bankruptcy court might well determine that issue differently from the way the State court -- I mean, let's assume it wasn't an issue of burden of persuasion, but an issue of, I don't know, something that the forum decides.

MR. WALLACE: I don't mean to suggest that they should not be bound by other kinds of judgments. We're

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looking for what Congress might have intended here, and the fact that there was this explicit provision is of some importance, and there would be some question whether, if there were actually a different burden of persuasion, ordinary principles of res judicata would carry over, and yet explicitly the bankruptcy court is not to redetermine a question of tax liability that's embodied in a judgment, so there's corroboration on the face.

QUESTION: Thank you, Mr. Wallace.

We'll hear now -- you have 4 minutes remaining, Mr. Radasevich.

REBUTTAL ARGUMENT OF ROBERT RADASEVICH

ON BEHALF OF THE PETITIONER

MR. RADASEVICH: Thank you, Your Honor.

I'd like to address one point during my rebuttal, and that's the other five code sections which -- in which Congress did, in fact, determine an allocation of the burden of persuasion.

The first three are instances where Congress allocated the burden to two separate parties in litigation on different things that were involved in the matter. Under section 547, as I discussed with Justice Ginsburg, the prima facie proof is on the plaintiff, the affirmative defenses are on the defendant.

Under section 362, dealing with modification of

the automatic stay, the movant has certain burdens, the debtor has other burdens.

Under section 363, dealing with the use, sale, and lease of property, the debtor has certain burdens where the trustee, the party asserting an interest in the property has other burdens.

So Congress split the burdens because there were a bunch of things going on. That's not what we have in claim objections.

QUESTION: Was there a defaulted administrative proceeding in the Illinois Tax Commission, or whatever body it is in Illinois that decides those sort of things? Was this just a claim that had never been even administratively adjudicated?

MR. RADASEVICH: It was a claim that had not been administratively adjudicated except for the issuance of the NPL, which is the assessment. After that, the Illinois Department of Revenue found out about the bankruptcy. They didn't -- this certain Department, though they had filed other claims, didn't know about the bankruptcy.

They issued the NPL, filed proof of claim, Judge Posner in his decision recognized that that proof of claim was subject to challenge in the Circuit Court of Cook County administratively, so they recognized there was a

procedure there that was not completed because of the filing of the bankruptcy.

QUESTION: Which would have been a circuit court challenge to the administrative adjudication?

MR. RADASEVICH: Correct, Your Honor, and --

QUESTION: And the bankruptcy court, Judge Posner -- or the bankruptcy court could have lifted the stay and allowed that circuit court proceeding to go forward?

MR. RADASEVICH: Sure.

QUESTION: In which case the burden would have been the burden that you don't like?

MR. RADASEVICH: Absolutely.

QUESTION: So it's going to be up to the bankruptcy judge whether you're going to have the burden or not?

MR. RADASEVICH: Absolutely.

QUESTION: Why --

QUESTION: So is there any other instance you could think of where bankruptcy courts follow a different burden where Congress has been silent?

MR. RADASEVICH: Justice Breyer, I've read title VII cases which has a burden, but that's really a burden of shifting the production. The burden of persuasion ultimately remains with the claimant. I'm not aware of

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any.

And the other two code sections where Congress did specifically set forth the burden of persuasion, 1129 deals with the right unique to taxing authorities to trump plans if the plans are meant to defeat taxes. Rather than have the debtor prove the negative that a plan is not designed to defeat taxes, the taxing authority has to argue and prove it.

Under 364, dealing with obtaining credit, the usual rules, you can obtain unsecured credit. If you can't, subsection (b) says give them an administrative claim. If that doesn't work, give them a superadministrative claim and a junior lien on assets. If that doesn't work, give them a super-duper administrative claim and a charging lien on all assets, but if you're going to do that, trustee, then you better have -- you're going to sustain -- substantiate the burden of persuasion to show that those creditors whose rights you're priming in assets have been received adequate protection.

That's the exception to the rule, and Congress allocated a burden of persuasion dealing with that exception. The usual rule in bankruptcy allocates the burden of persuasion to all parties. Had Congress wanted to claim -- to establish an exception for taxing authorities, they could have. They didn't. We don't

think this Court should either.

Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Radasevich.

The case is submitted.

(Whereupon, at 11:06 a.m., the case in the above-entitled matter was submitted.)

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CASE NO: 99-387

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BY Ann Marie Federico

(REPORTER)