

GINSBURG, J., dissenting

**SUPREME COURT OF THE UNITED STATES**

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No. 02–1192

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COOPER INDUSTRIES, INC., PETITIONER *v.* AVIALL  
SERVICES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT

[December 13, 2004]

JUSTICE GINSBURG, with whom JUSTICE STEVENS joins,  
dissenting.

Aviall Services, Inc., purchased from Cooper Industries, Inc., property that was contaminated with hazardous substances. Shortly after the purchase, the Texas Natural Resource Conservation Commission notified Aviall that it would institute enforcement action if Aviall failed to remediate the property. Aviall promptly cleaned up the site and now seeks reimbursement from Cooper. In my view, the Court unnecessarily defers decision on Aviall’s entitlement to recover cleanup costs from Cooper.

In *Key Tronic Corp. v. United States*, 511 U. S. 809, 818 (1994), all Members of this Court agreed that §107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U. S. C. §9607, “unquestionably provides a cause of action for [potentially responsible persons (PRPs)] to seek recovery of cleanup costs.” The Court rested that determination squarely and solely on §107(a)(4)(B), which allows *any* person who has incurred costs for cleaning up a hazardous waste site to recover all or a portion of those costs from any other person liable under CERCLA.<sup>1</sup>

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<sup>1</sup>Key Tronic, a PRP, asserted a cost-recovery claim under §107(a) to recoup approximately \$1.2 million in costs that it allegedly incurred

GINSBURG, J., dissenting

The *Key Tronic* Court divided, however, on the question whether the right to contribution is implicit in §107(a)'s text, as the majority determined, or whether §107(a) expressly confers the right, as the dissenters urged. The majority stated: Section 107 “*implies*—but does not expressly *command*—that [a PRP] may have a claim for contribution against those treated as joint tortfeasors.” 511 U. S., at 818, and n. 11 ((emphasis added)). The dissent maintained: “Section 107(a)(4)(B) states, as clearly as can be, that ‘[c]overed persons . . . shall be liable for . . . necessary costs of response incurred by any other person.’ Surely to say that A shall be liable to B is the *express* creation of a right of action.” *Id.*, at 822. But no Justice expressed the slightest doubt that §107 indeed did enable a PRP to sue other covered persons for reimbursement, in whole or part, of cleanup costs the PRP legitimately incurred.

In its original complaint, Aviall identified §107 as the federal-law basis for an independent cost-recovery claim against Cooper, and §113 as the basis for a contribution claim. App. 8A, 16A–17A. In amended pleadings, Aviall alleged both §§107 and 113 as the federal underpinning for its contribution claim. *Id.*, at 27A, 48A. Aviall’s use of §§113 and 107 in tandem to assert a contribution claim conformed its pleading to then-governing Fifth Circuit precedent, which held that a CERCLA contribution action arises through the joint operation of §107(a) and §113(f)(1). See *Geraghty and Miller, Inc. v. Conoco, Inc.*, 234 F. 3d 917, 924 (2000) (“[W]hile section 113(f) is the

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cleaning up its site “at its own initiative.” *Key Tronic Corp. v. United States*, 984 F. 2d 1025, 1026 (CA9 1993). Although Key Tronic settled a portion of its liability with the Environmental Protection Agency (EPA), the claim advanced in Key Tronic’s §107(a) suit rested on remedial action taken before the EPA’s involvement, remediation that did not figure in the settlement. *Id.*, at 1026–1027; *Key Tronic Corp. v. United States*, 511 U. S. 809, 811–812 (1994).

GINSBURG, J., dissenting

vehicle for bringing a contribution action, it does not create a new cause of action or create any new liabilities. Rather, it is a mechanism for apportioning costs that are recoverable under section 107.” (footnote omitted). A party obliged by circuit precedent to plead in a certain way can hardly be deemed to have waived a plea the party could have maintained had the law of the Circuit permitted him to do so. But cf. *ante*, at 9–10.

In the Fifth Circuit’s view, §107 supplied the right of action for Aviall’s claim, and §113(f)(1) prescribed the procedural framework. 312 F. 3d 677, 683, and n. 10 (2002) (stating that §107 “impliedly authorizes a cause of action for contribution” and §113(f) “govern[s] and regulate[s]” the action (citing *Geraghty and Miller*, 234 F. 3d, at 924) (internal quotation marks omitted)); see §113(f)(1) (calling for the governance of “Federal law” and the application of “the Federal Rules of Civil Procedure,” and specifying that “[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate”). Notably, Aviall expressly urged in the Court of Appeals that, were the court to conclude that §113(f)(1)’s “during or following” language excluded application of that section to this case, Aviall’s suit should be adjudicated independently under §107(a). See Response of Appellant Aviall Services, Inc., to the *Amicus Curiae* Brief of the United States in No. 00–10197 (CA5), p. 24 (“[P]arties who are excluded from seeking contribution under section 113(f)(1) must therefore have available to them the broader right of cost recovery [covering both full recovery and contribution] under section 107(a.”); cf. *Key Tronic*, 511 U. S., at 816 (“[T]he statute now expressly authorizes a cause of action for contribution in §113 and impliedly authorizes a similar and somewhat overlapping remedy in §107.”).

I see no cause for protracting this litigation by requiring

GINSBURG, J., dissenting

the Fifth Circuit to revisit a determination it has essentially made already: Federal courts, prior to the enactment of §113(f)(1), had correctly held that PRPs could “recover [under §107] a proportionate share of their costs in actions for contribution against other PRPs,” 312 F. 3d, at 687;<sup>2</sup> nothing in §113 retracts that right, *ibid.* (noting that §113(f)’s saving clause preserves all preexisting state and federal rights of action for contribution, including the §107 implied right this Court recognized in *Key Tronic*, 511 U. S., at 816). Accordingly, I would not defer a definitive ruling by this Court on the question whether Aviall may pursue a §107 claim for relief against Cooper.

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<sup>2</sup>The cases to which the Court refers, *ante*, at 12, *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U. S. 630 (1981), and *Northwest Airlines, Inc. v. Transport Workers*, 451 U. S. 77 (1981), do not address the implication of a right of action for contribution under CERCLA. *Texas Industries* concerned the Sherman and Clayton Acts, 451 U. S., at 639–646; *Northwest Airlines*, the Equal Pay Act and Title VII, 451 U. S., at 90–99. A determination suitable in one statutory context does not necessarily carry over to a different statutory setting.