Pursuant to an opinion issued by the Colorado Supreme Court (the Court) on February 25, 2013, insurance coverage may be excluded under absolute pollution exclusion clauses for both nontraditional as well as “traditional” pollution under Colorado law. *Mountain States Mutual Casualty Company v. Christopher Roinestad, et al.*, 2013 CO 14 (Colo. Feb. 25, 2013). Agreeing with defense arguments on behalf of Mountain States Mutual Casualty Company (Mountain States), the Court joined other state supreme courts that uphold the broad nature of pollution exclusion clauses.

**Background**

This matter arose out of an incident in which respondents were overcome by hydrogen sulfide gas while cleaning a sewer clog near the Hog’s Breath Saloon & Restaurant (Hog’s Breath). Respondents filed suit in the state district court (the District Court) against Hog’s Breath, alleging negligence, negligence *per se* and off-premises liability. The negligence *per se* claim was based on a La Junta city ordinance that prohibits discharge of “pollutants” such as garbage and waste into the sewer system.

The District Court found that Hog’s Breath dumped large amounts of cooking grease into the sewer, which created a five- to eight-foot clog that led to the buildup of hydrogen sulfide gas. The District Court concluded that Hog’s Breath caused respondents’ injuries by dumping cooking grease into the sewer.

Hog’s Breath was an insured under a business-owners’ liability policy (the Policy) issued by Mountain States at the time of the alleged injuries. The Policy contained an absolute pollution exclusion that excluded coverage for “bodily injury … arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants” from the premises of an insured.

Mountain States initially defended Hog’s Breath against the allegations filed by respondents under a reservation of rights in the underlying action. Mountain States then sought determination by the U.S. District Court, District of Colorado (the Federal Court) regarding whether it had a duty to defend. Based on the absolute pollution exclusion contained in the Policy, the Federal Court ruled that coverage was excluded and Mountain States did not have a duty to defend. Based on the Federal Court’s order, Mountain States withdrew its defense. Large judgments were subsequently entered against Hog’s Breath in the District Court.

Respondents, who had not been parties to the Federal Court action, then sought to garnish the Policy. The District Court also granted Mountain States’s motion for summary judgment regarding insurance coverage in the garnishment action. The Colorado Court of Appeals (the Court of Appeals) then reversed the District Court’s decision, holding that the pollution exclusion clause was ambiguous and construed it against Mountain States. In its February 25, 2013, decision, the Court reversed the Colorado Court of Appeals, holding that coverage is excluded under the absolute pollution exclusion contained in the Policy.
The Court granted *certiorari* on the following issues:

1. Whether the Court of Appeals erred in construing Mountain States's pollution exclusion clause to *not* exclude coverage for plaintiffs’ injuries.
2. Whether, in this case, the Court of Appeals erred by directing the District Court to enter judgment for plaintiffs and to enforce the writ of garnishment rather than remanding the case to District Court for further proceedings.

**Analysis**

In its opinion, the Court considered interpretation and application of the pollution exclusion contained in the Policy. Around the time the Court accepted *certiorari*, the highest courts of approximately 25 states had considered whether the applicability of pollution exclusions was limited to “traditional” versus nontraditional environmental pollution events. A split of authority existed as to whether the pollution exclusion applied only in traditional environmental pollution incidences or more broadly to the “negligent use or handling of toxic substances that occur in the normal course of business.” See *IdleAire Technologies Corp. v. Wausau Business Ins. Co.*, No. 08-10969 (KG) at 6 (Bankr. D. Del. Feb. 18, 2009).

Respondents asserted that pollution exclusion clauses were included in commercial liability policies to relieve insurers for “traditional” pollution, such as “liability for cleanup and other costs associated with federal environmental protection laws such as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. The Court disagreed, stating that the pollution exclusion does not contain any language regarding federal environmental protection laws or “traditional” pollution. Therefore, the Court, considering the circumstances of this case, essentially held that application of the pollution exclusion was not limited to “traditional” pollution incidences. This decision brings Colorado in line with numerous other states that have held the pollution exclusion can exclude coverage for a range of pollutants, not just those linked to “traditional” environmental pollution.

The Court also considered and rejected respondents’ argument that the reasonable expectations doctrine applied to prevent exclusion of coverage. The Court held that based on the language of the Policy, “there is no reason to believe that an ordinary person would understand the pollution exclusion clause to apply only to ‘traditional’ pollution, nor would prevailing law limit the exclusion in such a way ... we cannot conclude that an objectively reasonable person would interpret the pollution exclusion clause to bar coverage only for ‘traditional’ pollution.”

In *Roinestad v. Kirkpatrick*, 2010 WL 4008895 at 19, the Court of Appeals claimed that it did not reach the question of whether pollutants were limited to a traditional context. Instead, the Court of Appeals ruled that the pollution exclusion was ambiguous and that its application to cooking grease, a common waste product, could lead to “absurd results and negate coverage.” The Colorado Supreme Court disagreed with the Court of Appeals, holding that under the circumstances of this case, the discharge of cooking grease amounted to the discharge of a pollutant. In making its determination, the Court considered that there was a city ordinance prohibiting the discharge of “solid or viscous pollutants,” which included reference to materials of the type at issue here. The Court also considered the large amount of materials that had been discharged in violation of the city ordinance.

By holding that the absolute pollution exclusion bars coverage, the Court reversed the Court of Appeals ruling that respondents could garnish the Policy. Therefore, the Court did not need to address the second issue regarding whether the Court of Appeals erred by directing the District Court to enter judgment for respondents without remanding for further proceedings.

This decision by Colorado’s highest Court will have vast and long-standing national implications in regard to application of absolute pollution exclusions. The states’ highest courts are about evenly split nationwide in regard to whether nontraditional pollution events are excluded under absolute pollution exclusions. Here, the Court determined that cooking grease, a household product, constituted a pollutant. The Court’s application of the exclusion in the context of a nontraditional event substantially broadens the exclusion's application. As a result, insurers must be prepared to apply and argue the legal and practical implications involved with nontraditional pollution events and the exclusion’s application.