



# Will courts clarify the implied false certification theory? Ninth Circuit holds that the Supreme Court established a mandatory test, but the issue remains unsettled

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On August 24, 2018, the U.S. Court of Appeals for the Ninth Circuit became the latest circuit court to weigh in on one of the most disputed areas of False Claims Act (“FCA”) jurisprudence—the implied false certification theory. In *United States ex rel. Scott Rose v. Stephens Institute*, a panel of judges for the Ninth Circuit held that the U.S. Supreme Court’s landmark 2016 decision, *United Health Servs., Inc. v. Escobar*, established a mandatory two-part test for prevailing under the theory. However, several district courts in other circuits have reached the opposite conclusion and held that *Escobar*’s test is not required; further, the court in *Stephens Institute* suggested that its decision was compelled by Ninth Circuit precedent rather than *Escobar* itself. Consequently, the scope of implied false certification liability will likely remain uncertain unless and until the Supreme Court provides further guidance or Congress passes a clarifying amendment to the FCA.

## Implied False Certification Liability

The FCA is a Civil War-era statute that imposes liability on any person who “knowingly presents, or causes to be presented,” to the United States or its representatives a “false or fraudulent claim for payment or approval.” Over time, the statute has become the federal government’s primary weapon in combating fraudulent claims to the federal purse. Yet despite its longevity and significance, key issues regarding its application remain unclear. In particular, liability under the implied false certification theory has proven to be one of the more controversial developments in FCA jurisprudence.

The implied false certification doctrine, as articulated by some courts, provides that FCA liability may arise when a person requests payment for his services but fails to disclose his noncompliance with a statutory, regulatory, or contractual requirement relevant to his eligibility for payment; the rationale is that the claim for payment is false because the submission of the claim itself is an implicit certification of compliance with the violated legal provision. It can be contrasted with the less controversial theory of express false certification liability. As courts have explained, express false certification liability arises

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when the claim for payment includes an explicit, yet false, certification that the person complied with a legal requirement.

Prior to *Escobar*, U.S. circuit courts diverged on whether and how the implied false certification theory could create liability under the FCA. The U.S. Court of Appeals for the Seventh Circuit [rejected](#) the theory outright, and those courts that adopted it differed on how it should be applied. Some courts, such as the U.S. Court of Appeals for the Second Circuit, [concluded](#) that it should be limited to cases where the defendant fails to disclose a violation of a provision that is an express condition of payment under the government contract or program. Others, such as the U.S. Court of Appeals for the D.C. Circuit, [rejected](#) this restriction and held that the violated provision need only be material to the claim for payment. Consequently, *Escobar* was highly anticipated by many in the hopes that it would bring clarity to this area of the law. However, while the Supreme Court conclusively [held](#) that the implied false certification theory is valid, its opinion continues to raise questions regarding the scope of the theory.

### ***Escobar's Two-Part Test***

In *Escobar*, the Court [explained](#) that implied false certification liability can be established when two conditions are satisfied: (1) the claim for payment “makes specific representations about the goods or services provided”; and (2) “the defendant’s failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.” In one respect, this test is less restrictive than some of the standards previously established by circuit courts because it does not require that the statutory, regulatory, or contractual provision at issue be an express condition of payment. Yet, in another respect, it is more restrictive because it requires that the claim includes a specific representation, which is a condition that did not exist in prior standards.

However, the opinion also contains language suggesting that the Court did not intend the test to cover definitively all circumstances in which implied false certification liability might arise. Specifically, the Court [wrote](#) that liability can be established “at least” when both conditions in the two-part test are met. It also [stated](#) that it “need not resolve whether all claims for payment implicitly represent that the billing party is legally entitled to payment” because the “claims in this case do more than merely demand payment” and “fall squarely within the rule that half-truths . . . can be actionable misrepresentations.” These qualifiers appear to leave open the possibility that claims can still lead to implied false certification liability if they simply request payment and do not contain specific representations.

### **Divergence in the Lower Courts**

Shortly after the Supreme Court’s decision, lower courts began to grapple with the mandatory nature of the *Escobar* test. The qualifying language in the Court’s opinion led several district courts to conclude that the two-part test is not the exclusive means for establishing implied false certification liability. For instance, district courts in the U.S. Courts of Appeals for the [Ninth Circuit](#), [D.C. Circuit](#), and [Second Circuit](#) all held that meeting *Escobar*’s two-part test is not required. These decisions pointed to the Court’s use of the phrase “at least” and its statement that it “need not resolve” whether all claims implicitly represent that the party is entitled to payment. In contrast, some district courts have treated the two-part test as compulsory without explicitly analyzing the issue. For instance, a district court in the U.S. Court of Appeals for the Eleventh Circuit [wrote](#) that the plaintiff “must” allege both conditions in *Escobar*’s test, but it did not discuss *Escobar*’s qualifying language or analyze its import.

Before *Stephens Institute*, this issue was primarily addressed at the district court level with little direction from federal appellate courts. However, importantly for the resolution of *Stephens Institute*, two opinions issued in 2017 by the U.S. Court of Appeals for the Ninth Circuit seem to treat the *Escobar* test as indispensable. On January 12, 2017, a three-judge panel writing for the Ninth Circuit [held](#) that a plaintiff could not establish implied false certification liability under *Escobar*’s two-part test because the defendant’s claims for payment did not include any specific representations. Several months later, another Ninth Circuit panel similarly [wrote](#) that the “two conditions [of the *Escobar* test] must be satisfied.” As

with the district courts reaching similar conclusions, these opinions appear to view the test as mandatory without directly tackling the issue.

### ***Stephens Institute and its Impact***

In *Stephens Institute*, a panel of three judges writing for the Ninth Circuit took the circuit's prior decisions a step further and explicitly **held** that *Escobar*'s two-part test is mandatory. However, the panel made clear that its decision was based on prior Ninth Circuit precedent rather than *Escobar* itself. It **wrote** that it would likely reach a different conclusion were it "analyzing *Escobar* anew" because "the Court did not state that its two conditions were the *only* way to establish liability under an implied false certification theory." Yet, it recognized that its prior opinions "appear to require *Escobar*'s two conditions nonetheless" and **concluded** that it is bound by those opinions "unless and until our court, *en banc*, interprets *Escobar* differently."

At least in the near term, *Stephens Institute* firmly establishes the required nature of *Escobar*'s two-part test within the Ninth Circuit. This development will likely be bad news for plaintiffs and welcome news for defendants. As the court in *Stephens Institute* **acknowledged**, *Escobar*'s two-step test is a stricter standard than pre-*Escobar* Ninth Circuit law, which simply asked whether the defendant was noncompliant with a law, rule, or regulation that is "necessarily implicated" in the claim for payment. Nonetheless, if the Ninth Circuit follows the panel's nudge and rehears the matter *en banc* (i.e., before all the judges rather than a panel), the state of the law in the Ninth Circuit could change. As *Stephens Institute* and other courts have recognized, the qualifying language in *Escobar* provides an argument that the Court did not intend for its two-part test to encompass the exclusive bounds of implied false certification liability. Thus, an *en banc* court may very well overturn the prior panel decisions.

The Ninth Circuit aside, on the national level *Stephens Institute* far from resolves the nature of *Escobar*'s two-part test. As mentioned, several lower courts in other circuits have held that the test is not mandatory; these courts are not bound by *Stephens Institute*, and, indeed, the reasoning of the Ninth Circuit's opinion supports their holdings. The decision does create, however, an opportunity for a circuit split, which could prompt Supreme Court review. Should a different federal appeals court conclude that *Escobar*'s two-part test is not required, the Supreme Court might intervene to resolve the split. Alternatively, the scope of implied false certification might also be solved through Congress passing a clarifying amendment to the FCA. Absent either of these developments, this area of the law will likely remain unsettled for the foreseeable future and create uncertainty for litigants and potential litigants in the FCA arena.

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