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Under Federal Circuit Rule 36, the Federal Circuit may issue a judgment affirming the lower tribunal’s decision without a written opinion. This is colloquially known as a “Rule 36 affirmance” or “summary affirmance.” For appellees, it is often true that a pure affirmance is the goal, and a Rule 36 affirmance can be the most beneficial outcome. In this article, I offer background information on Rule 36 affirmances and tactics for appellees seeking to place themselves in the best positions to obtain Rule 36 affirmances.

What Is a Rule 36 Affirmance?

The Federal Circuit disposes of cases in three ways: (1) precedential opinions; (2) nonprecedential opinions; and (3) affirmances without a written opinion under Federal Circuit Rule 36.[1] As a general matter, a Rule 36 affirmance is appropriate when an opinion would have no precedential value and the decision below is correct.[2] Federal Circuit Rule 36 sets forth five conditions where Rule 36 affirmance is appropriate:

(a) the judgment, decision, or order of the trial court appealed from is based on findings that are not clearly erroneous;
(b) the evidence supporting the jury’s verdict is sufficient;
(c) the record supports summary judgment, directed verdict, or judgment on the pleadings;
(d) the decision of an administrative agency warrants affirmation under the standard of review in the statute authorizing the petition for review; or
(e) a judgment or decision has been entered without an error of law.[3]

How Does the Federal Circuit Decide to Issue a Rule 36 Affirmance?

The court’s decision to use a Rule 36 affirmance is generally made right after the oral argument. After an oral argument, the panel of three judges who heard the case will hold a conference and exchange tentative views and votes.[4] The judges announce a “straw” vote, in reverse order of seniority, on the decision in each case and on whether to employ a precedential opinion, a nonprecedential opinion, or a judgment of affirmation without opinion under Rule 36.[5] An election to utilize a Rule 36 affirmance must be unanimous among the judges of a panel.[6]

Rule 36 judgments are per curiam, Latin for “by the court,” which means that there is no specific authoring judge.[7] Somewhere between a quarter and a half of the Federal Circuit’s opinions are Rule
Why Is a Rule 36 Affirmance an Advantageous Outcome?

As personally gratifying as it may be to hope for a lengthy opinion that praises your arguments and denigrates your opponent’s position, the client is often more interested in the result — all else being equal, it is usually better to win quickly, clearly, and in a way that is unlikely to be undone later in the process. Rule 36 affirmances are often a highly desirable outcome for an appellee because they are fast, unambiguous, and very difficult to challenge.

As an initial matter, a win without a written decision is generally safer than a win with a written decision. A written decision has the potential to be fraught with issues. Once the court writes a decision — even if it is generally favorable — it opens the door that the court will write something unfavorable as well. And there is always the chance that a favorable written decision includes errors that make it vulnerable to a request for rehearing, rehearing en banc, or a petition for certiorari. Even a mostly favorable written opinion may require a remand or a new trial. In other words, a written opinion opens up the possibility that the case is not a total win.

A Rule 36 affirmance is nearly impossible to obtain rehearing or rehearing en banc, or seek U.S. Supreme Court certiorari, because there is no appellate decision to challenge. As the practice notes to Federal Circuit Rule 35 indicate, “A petition for rehearing en banc is rarely appropriate if the appeal was the subject of a nonprecedential opinion by the panel of judges that heard it.” In other words, a Rule 36 affirmance is difficult to overturn in later challenges.

Further, a Rule 36 affirmance generally provides a result in a relatively short amount of time. A Rule 36 opinion usually issues within a week of the oral argument. Even a very fast written decision generally will not issue for several months.

It is important to note that it is not always advantageous to obtain a Rule 36 affirmance. Obviously for an appellant, a Rule 36 affirmance is not a desirable outcome. Even for some appellees, a Rule 36 affirmance may not be the preferred outcome. Generally speaking, parties are more interested in winning below than posturing an appeal for an affirmance without a decision on appeal. It sometimes makes sense to win on an ambitious or novel argument that may require a written decision on appeal.

What Are Some Strategies for Obtaining a Rule 36 Affirmance?

There are a few strategies that can be used to increase the changes of an affirmance — and potentially an affirmance without decision — on appeal. Before the lower tribunal it is preferable to (1) win on multiple grounds; (2) win with the application of the correct law; and (3) win on issues, such as fact finding, that require deference on appeal. Also, the winning party should help the district judge write a strong opinion by presenting arguments clearly and by providing the correct legal standards and relevant factual discussion. Once the case is on appeal, posturing a case for a Rule 36 affirmance generally requires arguing not only that the lower tribunal reached the right result, but that the relevant law is evident and established and that the lower tribunal followed it to the letter. It goes without saying that the appellee’s brief should be as clear and informative as possible.

First, to affirm under Rule 36, the court must decide that “an opinion would have no precedential value.” Thus, the appellee should try to keep the case legally uninteresting. In other words, an appellee should argue that there is nothing novel about the law or the application of that law to the facts of the
case. Instead, an appellee should urge that the case hinges on the facts and is entitled to a highly
deerential standard of review.

Second, if possible, the appellee should avoid complicating the issues with a cross-appeal. A cross-
appeal undercuts the argument that the challenged decision was correct. It can increase the complexity
of the case, making it more likely the court will determine a written decision is necessary.[13]

Third, the equities matter. The appellee must convince the court that it is appropriate for the lower
tribunal’s treatment of the case to be the last word, and there is nothing to be gained in having the
court say more. To provide comfort to the court that a Rule 36 affirmance is a fair outcome, the appellee
should reinforce that the losing party was fully heard below and not treated unfairly. The appellee
should be prepared to discuss at oral argument the equities of the result reached below. Likewise, if the
appellant’s brief gives the impression that the lower tribunal was unduly hasty in making up its mind,
the appellee should be prepared to defend the tribunal’s decision-making and point out any places the
appellant may have failed to make an argument or misled the decision-maker.

Finally, from the court’s perspective, judges are busy and their time is a limited resource. In general,
affirming takes less effort than reversing, and affirming without a decision requires less effort than
affirming with an opinion. Judges are also fair-minded. They want to get the right result. An appellee
that can convince the Federal Circuit that the result was correct, that nothing is gained in a second look
at the decision below or a written decision, and that the process below was fair will place itself in the
best position to obtain a Rule 36 affirmance.[14]

Conclusion

Where a quick and difficult-to-overturn affirmance is the goal, an appellee can make some strategic
decisions to place itself in the best possible position to win — and potentially win with a Rule 36
affirmance.

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[4] IOP No. 8.1; see also http://patentlawcenter.pli.edu/2013/07/15/what-is-a-rule-36-
judgment/.

The court’s internal operating procedures note that “Rule 36 judgments shall not be employed as binding precedent by this court, except in relation to a claim of res judicata, collateral estoppel, or law of the case, and shall carry notice to the nonprecedential effect.” IOP No. 9.8. However, a Rule 36 affirmance may or may not require the application of issue preclusion, which should be a consideration for appellees in determining whether a Rule 36 affirmance would be a desirable outcome. See TecSec., Inc. v. IBM Corp., 731 F.3d 1336, 1343-44 (Fed. Cir. 2013) (finding that a previous Rule 36 affirmance did not “expressly or by necessary implication decide[] the claim construction issues” in the prior appeal, so neither the mandate rule nor collateral estoppel applied to bar the appellee from rearguing claim construction on the second appeal).

Parties are entitled to argue alternate grounds for affirmance in situations where a cross-appeal is not appropriate. See, e.g., Voda v. Cordis Corp., 536 F.3d 1311, 1324 n.4 (Fed. Cir. 2008).

The author has used a number of these strategies to obtain Rule 36 affirmances in a number of cases. See, e.g., Wright v. Toro, Nos. 14-1534, -1558 (Fed. Cir. May 12, 2015); Phil-Insul Corp. v. Reward Wall Systems, Inc., Nos. 14-1078, -1098 (Fed Cir. Oct. 10, 2014); W.L. Gore v. Medtronic, Inc., No. 12-1538 (Fed. Cir. Sept. 12, 2013).