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Predicting Fed. Circ. Rule 36 Affirmances In Patent Cases

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Experienced patent litigators rely on intuition to advise clients on the timing of U.S. Court of Appeals for the Federal Circuit Rule 36 affirmances, but, to date, no one has compiled and published comprehensive statistics on the use of Rule 36 at the Federal Circuit.

We reviewed more than 1,700 dockets to calculate the time between argument and Rule 36 judgment to determine trends in timing and affirmance rate since 2013 across various lower courts and agencies appealing to the Federal Circuit.

Imagine spending upward of a year briefing and arguing an appeal before the Federal Circuit after losing at the lower court. After weeks of preparation for a mock and then having a virtual or in-person appellate oral argument, you wait. Then, imagine less than a week later, or worse, even a month or more, seeing the words every patent appellant dreads:

> Per Curiam.
>
> AFFIRMED. See Fed. Cir. R. 36.

No written opinion. No glimmer of dicta to latch onto for rehearing en banc or a petition for certiorari. Not even a separate judgment. You got Rule 36ed, in Federal Circuit parlance. For an appellant, this is utter defeat. On the flip side, a quick and difficult-to-overturn decision is particularly satisfying for the appellee.

Such is the reality for approximately 40% of appellants from Patent Trial and Appeal Board rulings and nearly 25% of appellants from district courts. So how does one prepare clients for this possibility, and what is the timeline of a Rule 36 summary affirmance? This is the No. 1 thing every client wants to know immediately following oral argument.

The Federal Circuit's use of Rule 36 affirmances in deciding appeals is a controversial and somewhat mysterious practice. Rule 36 does not give clear guidance under what circumstances a Rule 36 affirmance should be applied, saying only that '"[t]he court may enter a judgment of affirmance without opinion' under certain conditions when the 'opinion would have no precedential value."'[1]

Rule 36 itself provides very little substance that practitioners can rely upon to predict whether their appeal

will end in a Rule 36 judgment. Consequently, parties are often left trying to predict the likelihood of a Rule 36 affirmance based on the amount of time that has passed since oral argument — operating under the assumption that the more time that passes since oral argument, the lower the likelihood of receiving a Rule 36 decision.

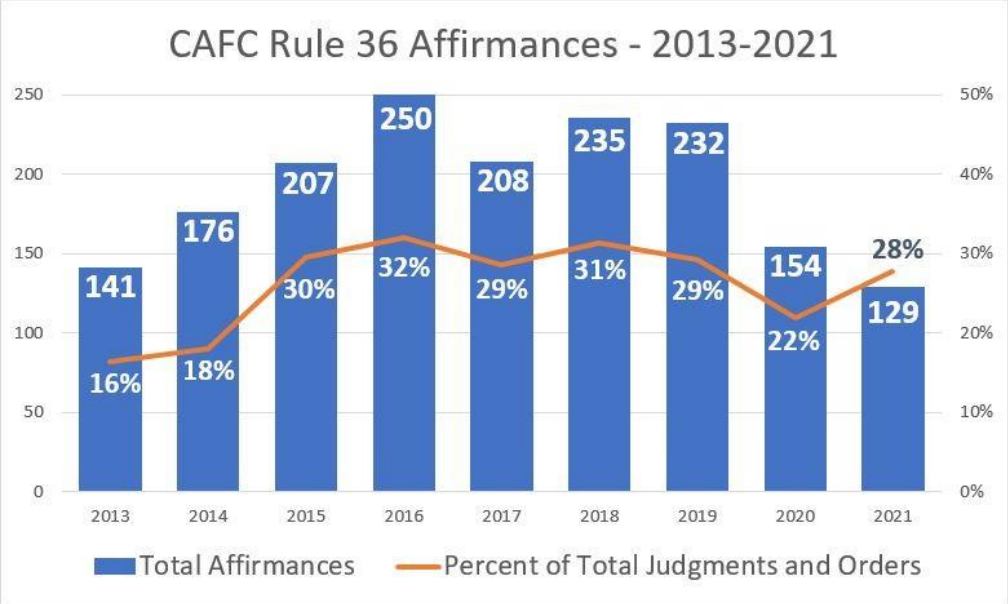
Yet there has been surprisingly little data gathered on, and no meaningful statistical compilations and assessments of, the likelihood of getting Rule 36ed, until now. This article sets forth the timing between oral argument and Rule 36 affirmances at the Federal Circuit, assessed across lower court types, since 2013.

The data was collected using the opinions and orders posted to the Federal Circuit website.[2] First, the total number of precedential opinions, nonprecedential opinions and orders, and Rule 36 judgments were determined per year.

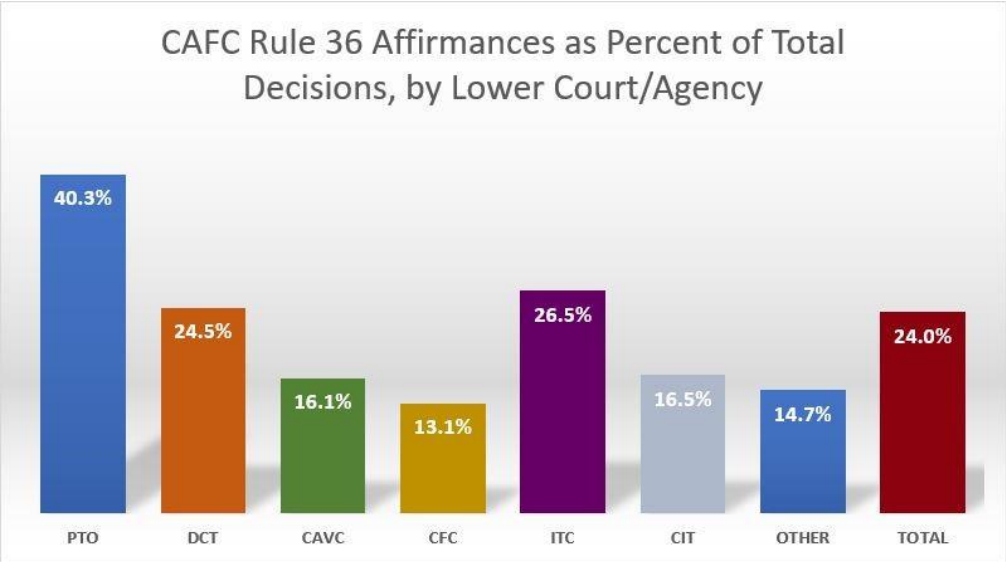
For each Rule 36 judgment, the number of days from submission to judgment by year were tabulated based on the date provided in the docket or oral argument date. In only about 2% — 30 out of 1732 between Jan. 1, 2013, and Sept. 24, 2021 — of Rule 36 affirmances was the case submitted on the briefs.

Total and percent of Rule 36 affirmances vary by year and jurisdiction.

Total Rule 36 affirmances, for cases originating from all jurisdictions, peaked in 2016-2019, declining in both number and percent of total judgments during the early months of the pandemic. Based on the cases decided to date in 2021, the number and percentage of Rule 36 affirmances appear to be tracking prepandemic numbers:



Appellants from the U.S. Patent and Trademark Office fare the worst in terms of percentage of decisions being Rule 36 affirmances. On the other side, appellants from the U.S. Court of Federal Claims, U.S. Court of Appeals for Veterans Claims and the U.S. Court of International Trade fare the best, having the fewest percentage of total decisions coming in the form of a Rule 36 affirmance:



"Other" includes judgments in appeals to the Federal Circuit from the U.S. Merit Systems Protection Board, U.S. Civilian Board of Contract Appeals and U.S. Department of Justice.

If two weeks have elapsed after argument without a judgment, there is a high likelihood of a written opinion.

Appellants and appellees alike tend to believe that if a Rule 36 affirmance is coming, it will likely come quickly. And for the most part, that is true, with a median of four days (USPTO, Court of Veterans Claims, ITC and CIT) or five days (district courts and Court of Federal Claims) and mean average[3] as shown here:

The average time to Rule 36 affirmance is generally between three and seven days, with a few higher values — i.e., about 10 days for Court of Veterans Claims in 2013 and Court of Federal Claims in 2020 — resulting from small sample sizes. However, many factors can influence time to disposition. For example, submission of subsequent authority, supplemental briefing, or filing of corrected briefs post-argument can delay judgment until after such papers are submitted.

Generally, though, the court endeavors to issue Rule 36 judgments quickly, with more than 94% of Rule 36 judgments (1,473 of 1,578) coming two weeks or fewer after argument, and more than 97% of Rule 36

judgments (1,536 of 1,578) coming four weeks or fewer after argument. In sum, if an appellant-client has not received a Rule 36 judgment after two weeks, there is a very good chance the case will be decided with a reasoned written opinion.

But it's not a guarantee.

Of course, this is no sure thing, as a few appellants have found out the hard way, with stratospheric outliers unexplained by the court. Since 2013, the Federal Circuit has issued seven Rule 36 affirmances more than 100 days after argument, including a USPTO appeal with a whopping 376 days between argument and judgment, and, surprisingly, no docket entries in between.

One possibility is that these were cases in which the panel reached a stalemate and could not decide the correct basis for articulating affirmance. To add insult to injury, costs were taxed to that appellant after more than a year of waiting, which happens in around 90% of all Rule 36 affirmances in appeals from the USPTO and district courts.

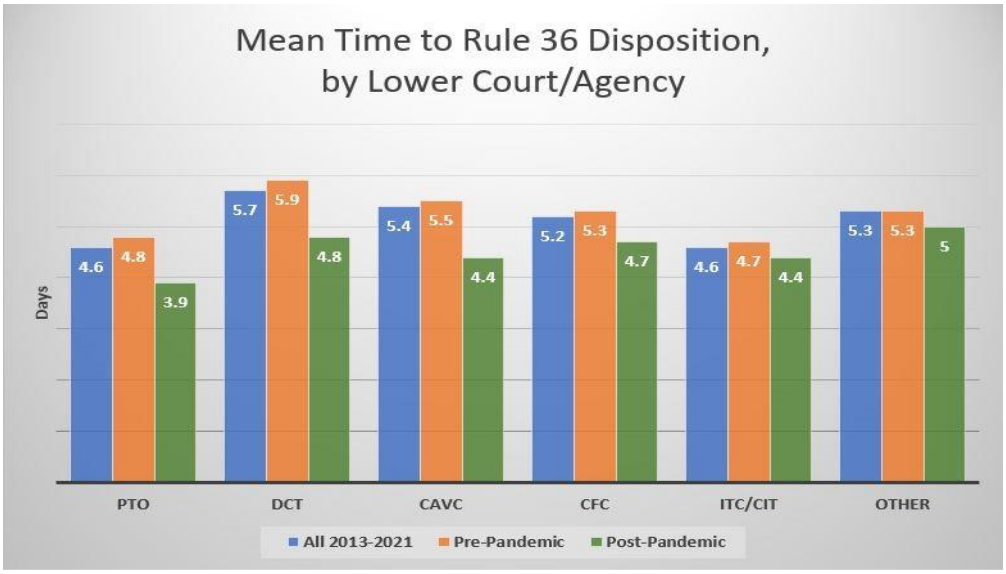
As a result, it is important to counsel clients that, while more time makes a Rule 36 affirmance statistically less likely, there is still a chance, albeit small, that such an affirmance is still coming.

COVID-19 resulted in fewer, but faster, Rule 36 affirmances.

During the pandemic, Rule 36 affirmances fell dramatically in both number and percent of total cases in 2020. This is likely due to the reduced number of oral arguments and more cases submitted on the briefs.

The Federal Circuit's seeming trade-off for issuing more Rule 36 judgments is that it hears many more arguments than its sister circuits and issues very few Rule 36 judgments on the briefs, consequently leading panels to write more nonprecedential opinions. Indeed, Federal Circuit judges have spoken publicly about this trade-off, suggesting that all parties get their day in court with this practice.

The percentage of summary affirmances has rebounded in 2021 to near prepandemic levels. Overall, in comparing Rule 36 affirmances before and after March 11, 2020, there has been a drop in the average time to Rule 36 disposition across the board, with approximately a one-day decrease in affirmances of the USPTO, district courts, and the Court of Veterans Claims:



Conclusion

This review of Rule 36 judgments at the Federal Circuit confirms the heuristic approach of experienced practitioners: If a summary affirmance is going to happen, it is likely to happen quickly. But, as with all things, the devil is in the details.

Here are the takeaways based on our firsthand crunching of the numbers:

- A decision issued more than 14 days after oral argument is highly unlikely to be a Rule 36 summary affirmance.
- Appeals from the USPTO have a 40% likelihood of receiving a Rule 36 affirmance, while appeals from district courts are around 25%.
- District court appeals have the longest average time to Rule 36 affirmance (5.7 days), while USPTO appeals have the shortest (4.6 days).
- Average times to Rule 36 affirmance have decreased approximately one day since the start of the pandemic.
- Rule 36 summary affirmances can still come down more than a year after oral argument.

We hope to see the trend of shorter times to Rule 36 decisions continue — it is much easier to rip the bandage off quickly than to wait in hope for weeks, only to have the electronic case file notification pop up with the dreaded "AFFIRMED. See Fed. Cir. R. 36."

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Dechert paralegal Jacinda Marley contributed to this article.

[1] The Federal Circuit's five conditions set forth in Rule 36 provide little more insight than simply saying "the trial court or administrative agency got it right" based on the law or facts:

(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 affirmance 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.

[2] http://cafc.uscourts.gov/opinions-orders.

[3] Mean time-to-judgment was calculated by excluding the highest and lowest 10% time-to-judgment from each dataset to remove outliers.