

# Q PROFESSIONAL LIABILITY DEFENSE QUARTERLY

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## How Defendants Avoid Plaintiff Details with QSFs

Jeremy Babener | *Structured Consulting*

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Qualified Settlement Funds (QSFs) can provide defendants a faster and easier path to closing settlement discussions, often allowing the parties to separate without resolving, or even discussing, a variety of issues. This article identifies many of the benefits for defendants and plaintiffs, and provides helpful background for those who have not taken advantage of QSFs before. We also include practical thoughts from many experts who are regularly involved in settlement advising and negotiating.

In short, QSFs can often be used to expedite settlements and deliver on defendants' primary goals—namely, release from liability and an immediate tax deduction—without getting entangled in plaintiffs' settlement planning decisions and lien issues. This sometimes underutilized tool can be a solution not just for defendants, but also a tremendous benefit to plaintiffs.

— *Continued on next page*

## Letter from the President

David C. Anderson, Esq. | *Collins Einhorn Farrell, PC*

### Celebrating 15 Years!

Would you believe that our beloved PLDF is a teenager now? Seems like just yesterday that it was taking its first steps under the guidance of Tom and Chris Jensen. And now, we're celebrating our 15th anniversary! And like any teenager, the PLDF is brimming with energy, enthusiasm, and a bit of rebellious spirit. Over

the past 15 years, we've grown, we've learned, and we've definitely had our fair share of adventures.

From navigating those first days as a start-up in the professional liability community to a sell-out annual meeting in Denver 2023, the PLDF has truly come of age. We've faced challenges head-on (i.e. the pandemic), learned valuable

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## History of QSFs

Officially becoming available in 1993, Qualified Settlement Funds were borne from the statutory concept of the “designated settlement fund.” Before QSFs, defendants often found themselves entangled in convoluted settlement processes, waiting for plaintiffs to resolve lien issues and make settlement planning decisions.

Unavoidable inefficiency marked the pre-QSF era. Defendants were caught in limbo, with hands tied until plaintiffs decided on their course of action. Or alternatively, defendants would insist on finalizing settlement, using available leverage (including increased payouts) to convince plaintiffs to forego potential value by rushing. It was an era without good alternatives to significant delays, uncertainty, and for plaintiffs, resulting financial instability. Says lawsuit settlement expert and trust attorney Michele Fuller, “Before QSFs, we lacked the ability to give both sides what they needed. You really had to choose between defense and plaintiff benefits.”

By leveraging QSFs, defendants can now obtain a release, make payment, and secure their tax deduction. This was a fundamental change. The settlement process was no longer a protracted battle but a streamlined procedure. Settlement planning expert Greg Maxwell writes, “QSFs shifted the paradigm. They boiled the settlement process down to a single issue – the settlement amount. Once we nail that down, QSFs give us the means to close settlement negotiations, even when plaintiffs have many issues that still need working out.”

The benefits of QSFs for defendants are manifold. Besides the obvious financial advantages, QSFs offer defendants peace of mind. QSFs allow defendants a way to get what they need without forcing plaintiffs to sacrifice the chance to thoughtfully make life-changing deci-

sions, which, in turn, protects defendants for lingering liability concerns.

## The Benefits of QSFs for Defendants

QSFs offer many benefits to defendants. Primarily, they are an immediate release from liability, the ability to make immediate payment, and the resulting tax deduction, all while steering clear of plaintiffs’ settlement planning decisions and lien issues. QSFs, when used judiciously, can streamline the settlement process, benefiting both defendants and plaintiffs alike.

### 1. Immediate Release from Liability

Prompt release from liability is incredibly important to most defendants. Arriving at an acceptable payout is often a hard-fought success. And, especially when many plaintiffs are involved, defendants remain unsure if their liability is limited and closed until the settlement is signed. With the size of the payout known, securing a full liability release as soon as possible is typically the top priority. QSFs make this possible, even with many loops still open for plaintiffs.

To understand the significance of this benefit, consider the following hypothetical. Corporation X is entangled in a mass tort lawsuit. The legal proceedings have been drawn out over years, and finally, both parties agree on a settlement amount. But, plaintiffs’ counsel informs Corporation X that plaintiffs need at least a year to allocate and structure amounts among plaintiffs, negotiate third-party liens, and establish various trusts.

Corporation X, eager to be done with the dispute, opts to use a QSF. In exchange for a full release, Corporation X transfers the settlement amount to the QSF. Plaintiffs take more than two years to process their many decisions—but this is no matter to Corporation X.

QSFs allow defendants a way to get what they need without forcing plaintiffs to sacrifice the chance to thoughtfully make life-changing decisions, which, in turn, protects defendants for lingering liability concerns.

“We consistently see that defendants prefer securing that immediate and full release by using a QSF,” says Rachel McCrocklin of Eastern Point Trust Company. “There’s just too much uncertainty about how long plaintiffs will need to sort out each issue—and there’s nothing that defendants need that they’re not getting.” Eastern Point has been a QSF thought leader for some time, developing case law and efficiencies to make QSFs easier to use.

Critically, the immediate release from liability avoids the possibility that some plaintiffs change their minds about the negotiated-for settlement amount. Without it, drawn out discussions of settlement agreement language, and settlement planning, maintain unpredictability. For many defendant companies, unpredictability necessitates liability reserves, a poor use of capital especially when capital costs are high. Continued unpredictability also distracts company decision-makers who are needed to manage and monitor an ongoing and significant open loop.

Says Joe Di Gangi, settlement planning expert and Former President of the Society of Settlement Planners, “Defendants often want to move fast to pay before the plaintiff has had time to plan. QSFs can be invaluable by giving both sides what they need.”

## 2. Prompt Payment and Tax Deduction

Once a full release is obtained, the next most important goal is obtaining the

benefit of the tax deduction. For defendants, the ability to make prompt payment and reap the resulting tax deduction can be very valuable. Every dollar of deduction avoid tax on a dollar of unrelated business income. QSFs address this need.

Ordinarily, a defendant may only deduct a settlement payment once a plaintiff (or their attorney) receives the amount. Under the “economic performance” rules, an accrual-basis taxpayer that makes payment to a settlement fund, or segregates amounts in a separate account, cannot deduct that value. However, QSF regulations overrule the restriction, permitting defendants to deduct amounts paid to QSFs. Treas. Reg. § 1.468B-3(c). This is even true for amounts that defendants might get back, provided that the refund is contingent upon the consent of third parties (e.g., a court, agency, or plaintiffs).

Put simply, the rules allow defendants to accrue deductions immediately upon making payment, rather than waiting for conditions and events that will occur later, perhaps much later.

Says tax attorney Matt Meltzer, “The timing of the deduction for a settlement payment is typically critical to defendants’ tax planning and often drives the timing of settlement payment. Without the QSF deduction rules defendants would hold off on paying into a settlement fund until shortly before distributions are due to the plaintiffs. In many cases, that timeline of events takes years.”

Fortunately, the defendants’ tax benefits do not come at the expense of the

plaintiffs. Use of a QSF, a separate taxable entity, preserves the tax treatment for plaintiffs. If payments received from the defendant would be tax-free, they’re still tax-free when received from a QSF. Treas. Reg. § 1.468B-4. The tax benefits to defendants and plaintiffs are not mutually exclusive, creating a practical settlement solution.

## 3. Avoidance of Plaintiff Settlement Planning Decisions

When a defendant transfers the agreed-upon settlement amount to a QSF, its involvement in the process effectively ends. It is no longer required, nor obligated, to engage in the intricacies of the plaintiffs’ settlement planning decisions. This separation ensures that defendants can avoid issues of allocation between plaintiffs, potential lien considerations, steps to preserve public benefits, or paperwork to effect structured settlements.

Avoiding the plaintiffs’ settlement planning decisions significantly expedites the settlement process for a defendant. It eliminates potential delays that could arise from disagreements over fund distributions and other plaintiff-related decisions. For example, without QSFs, defendants care far more whether and how plaintiffs will defer their right to future payments.

The administration of a QSF, when handled by a professional third-party trustee and administrator, is designed to provide fair and appropriate distribution of the funds. Nowadays this is typical. The defendant’s exit from the process simplifies its role and allows plaintiffs the time to make decisions while not extending negotiations with a highly adverse party.

Says leading settlement planner Jack Meligan, “It’s been my experience that most plaintiffs don’t want to be making these decisions with the defense looking

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over their shoulder. And likewise, many defendants prefer to avoid contingent liabilities and are happy to not be involved anyway.”

#### 4. Avoidance of Lien Issues

Liens, whether they are medical, governmental, or from other sources, have a direct claim on settlement proceeds. They can significantly reduce the net amount that plaintiffs receive, and their resolution is a critical step in closing the settlement. The process of identifying, negotiating, and satisfying these liens can be intricate and time-consuming.

When defendants opt to use a QSF, they extricate themselves from this cumbersome process. The responsibility of addressing lien issues then falls to the administrator of the QSF. “Liens can dramatically slow down a settlement,” says expert settlement advisor and former professor Joseph Tombs. “Especially because the relevant government agencies can take many months to confirm anything. QSFs allow defendants to pay and deduct before those confirmations come in.”

Fortunately, a defendant’s avoidance of lien issues does not disadvantage the plaintiffs. In fact, it can be beneficial. Any professionals negotiating to reduce liens for the plaintiff are better positioned because they are not simultaneously considering the timing needs of defendants.

#### Decisions Delaying Plaintiffs

Delayed decisions can be a formidable hurdle in settlements. They prolong resolution, escalate costs, and amplify the emotional toll on both parties.

##### 1. The Nature of Decisions Delaying Plaintiffs

Many settlement decisions can become stumbling blocks for plaintiffs, and with good reason. While plaintiffs may be anxious to receive funds, good plaintiff advisors caution to consider a variety of issues. Even after amounts are determined amongst the plaintiffs, and liens are accommodated, plaintiffs often need time to determine over what period to receive payments. Structured settlements typically offer value by deferring taxable damages and extending tax-free treatment to the investment of the settlement principal.

To illustrate, consider the fictional case of *Smith v. XYZ Corporation*. Here, Smith and others suffered debilitating injuries because of XYZ’s alleged negligence. After months of negotiations, the parties agreed on a settlement amount. However, deciding how to divide these funds among the different plaintiffs’ medical bills, lost wages, and pain and suffering becomes a Herculean task. Disagreements arise, causing delays and prolonging resolution. During much of it, XYZ’s job is to wait, checking in from time to time with plaintiffs’ counsel.

Another common decision leading to delays results from the slow resolu-

tion of liens and subrogation claims. Some of the plaintiffs in the Smith case received care for their injuries, paid for by Medicare. Upon settling, Medicare and other insurance companies will require reimbursement. Negotiating liens can become a time-consuming process, further delaying the plaintiffs’ access to the settlement funds.

Then there’s any decisions regarding structured settlements. Suppose the plaintiffs in Smith, given their long-term medical needs, preferred a structured settlement providing for regular payments over time instead of a lump-sum payment. Arranging this structure, and deciding on the right payment schedule, is dependent on the plaintiffs’ ability to quickly make life-changing decisions.

And there are several other settlement arrangements to consider. For example, the Plaintiff Recovery Trust, a much-needed solution in many taxable cases. Or use of the Plaintiff Fund Charity, a critical option for plaintiffs to use when fundraising for their medical care (PlaintiffFund.Org). Separately, plaintiff lawyers can greatly benefit from contingent fee deferral, which should also be implemented prior to final settlement.

##### 2. Both Sides Hate Delays and Coordinating

Settlement solutions can often benefit both sides, but also come at the cost of greater cooperation. A structured settlement, for example, greatly increases the value of the settlement to plaintiffs. This can result in less pressure on the defense to increase their cost. But, switching to a cooperative relationship is difficult for adversarial parties, especially immediately after a high-pressure negotiation.

And the uncertainty associated with these delays also affects a defendant’s financial planning. Until the settlement is finalized, the defendant remains unsure

about the exact outflow of funds, making budgeting and financial forecasting difficult.

For the defense, the delays and cooperation can come at great cost. Approval for settlement amount is a first hurdle—obtaining a second approval for the use of settlement solutions (e.g., a structured settlement) at a later date means rehashing the case. And often, considering new issues involving taxation and public benefits, which may require involving in-house counsel for approval.

For plaintiffs, involving the defense means that every consideration of settlement solutions must be disclosed and discussed with an adverse party. This means delays, loss of flexibility, and sharing highly personal information.

### QSFs as a Solution

Qualified Settlement Funds offer a compelling and pragmatic solution to this problem. In the words of McCrocklin, Chief Trust Officer for Eastern Point, “QSFs offer a clean break for defendants. They allow defendants to wrap up their part of the settlement swiftly, without having to wait for plaintiffs to make their decisions or resolve their liens.”

Once the funds are transferred to a QSF, the defendant's role in the settlement is essentially complete. They are no longer required to wait for the plaintiffs' various decisions to be made or liens to be resolved. The option allows them to close the books on the case earlier, reducing legal costs, and freeing up capital reserves.

“QSFs should represent an industry standard for complex personal injury cases,” says Patrick Hindert, author of the legal treatise *Structured Settlements and Periodic Payment Judgments*. “To their own disadvantage, defendants appear to be underutilizing this valuable settlement methodology.”

### How to Create and Use a QSF

A QSF is not a makeshift solution. It is backed by solid legal grounding. Treas. Reg. § 1.468B-1 provides firm requirements and steps for creation, operation, distributions, and tax reporting. As tax attorney Matt Meltzer notes, “The regulations are taxpayer-friendly and are meant to facilitate the resolution of disputes. Follow the rules and the benefits are available.”

Creating a Qualified Settlement Fund requires the establishment of a fund, account, or trust for the purpose of resolving claims from a single or related series of events. Treas. Reg. § 1.468B-1. It must be subject to the ongoing supervision of a court or government entity, and relate to one of many types of claims (e.g., tort, breach of contract, violation of law, etc.).

Selecting a QSF administrator is critical, just like choosing the trustee of a trust, says special needs attorney Michele Fuller. “Selecting the right QSF trustee is incredibly important. Efficiency and knowledge about settlement options is paramount. Otherwise, it will take forever for plaintiffs to finalize settlement solutions and receive their proceeds. Using the right trustee also helps insulate the firms and parties from liability that comes with handling large amounts, and a great trustee will have systems and protections in place, as well as increased FDIC coverage.”

Once appointed, the administrator assumes a plethora of responsibilities. Typically, it becomes the custodian QSF that monies, oversees operations, and ensures legal compliance. Paying claims is another crucial responsibility. The administrator addresses each claim, disbursing payments pursuant to any settlement agreement, and if relevant, court orders. The administrator also handles the QSF's tax obligations. It ensures that the QSF complies with all relevant tax laws,

filing returns, and making necessary payments. With these responsibilities, the QSF administrator operates at the intersection of finance, law, and legal ethics.

### Conclusion

Since regulations allowed QSFs in the early 1990s they have become increasingly popular. But their use has grown far faster in the last several years. Eastern Point reports that QSFs have tripled in use since 2020, largely attributing this to greater awareness among the trial and defense bars. In the early years they were almost exclusively used in class actions. More and more, they are used in most tort cases and single actions with only a few plaintiffs. While there is far less administration needed in cases with fewer plaintiffs, it is rare to find one without any tax, finance, or benefits issues that the parties will have to address. And if the parties want to separate before addressing them, a QSF will be the best option. With benefits for both sides, the QSF is a tool both plaintiff and defense counsel should know. ■



#### About the AUTHOR

**Jeremy Babener** is a tax lawyer focused on settlement strategies. He is Special Tax Counsel at *Lane Powell PC* and served in the U.S. Treasury's Office of Tax Policy.


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## New PLDF Website Launched

We are thrilled to announce that the **PLDF website**, [www.PLDF.org](http://www.PLDF.org) has been redesigned and updated. Check it out today and be sure to **login** to **update your member profile** here: <https://bit.ly/PLDFMemberProfile>.

Our sincere thanks to **Andrew Carroll** of *Clark Hill PLC* and **Scott Neckers** of *Overturf, McGath & Hull P.C.* for their help with this initiative. Thank you also to our Board of Directors for their leadership, guidance, and support in this effort. We are very proud of the new site and hope you enjoy our new look! ■



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—**Dave Anderson**  
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*"This will be my sixth time attending the PLDF Annual Meeting, each time is better than before. The educational material is top notch, only surpassed by the connections built with people in unique aspects of this field. Every year I come away with new insights and connections. Join us!"*

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—**Jennifer Groszek, JD, ARM, CPLP**  
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