

The QSF

Robert W. Wood

Increasingly today, someone involved in litigation is likely to raise the topic of Qualified Settlement Funds (QSF). The subject may be broached by a lawyer, client, mediator, judge, or structured settlement broker. Usually, this occurs during settlement negotiations.

If this hasn't happened to you yet, it probably will. It's important for plaintiffs, defendants, their counsel, mediators, judges, and structured settlement professionals to know the basics about Qualified Settlement Funds. So you are not caught flat-footed, you should have a sense how these funds work, when they are appropriate, and what limitations apply.

This article is not a comprehensive review of the nuances of Qualified Settlement Funds. What follows is a basic discussion of the principal roles, opportunities, and potential missteps involved in using these increasingly prevalent litigation resolution vehicles. We'll start with a little nomenclature.

What's In A Name?

Qualified Settlement Funds are actually called by a variety of different names. Qualified Settlement Funds, Qualified Settlement Trusts, QSFs, 468B funds, and even DSFs or Designated Settlement Funds (although these DSFs are slightly different from QSFs) are all enabled by section 468B of the Internal Revenue Code. Basically, they are trusts or accounts set up to resolve claims.

Regardless of the label, these funds date to 1986, when section 468B of the Internal Revenue Code was enacted. This Code section was a response to industry practice with class actions. Oddly enough (in light of certain issues to which we'll return later), it was enacted at the behest of defendants.

The idea was to enable defendants to claim their tax deductions for settlement payments currently, even though amounts might be tied up among warring plaintiffs for months, or even years. The normal rule is that a defendant cannot claim a deduction until the plaintiff receives the funds. The QSF rules are a big exception to the normal reciprocity between payor and payee in the tax law.

Requirements To Form A QSF

There are three requirements to form a QSF. First and foremost, they have to be subject to court supervision. That means you go to court and ask the judge to approve a QSF trust document and take jurisdiction over the assets. Second, the trust has to exist to resolve or satisfy legal claims. Third, the trust must qualify as a trust under state law. These three basic rules are pretty easy to satisfy.

There needs to be a trustee, but there is great flexibility as to who can occupy this role. In fact, even the plaintiff's lawyer can be a trustee, although I would never recommend that. Technically, anyone who has legal capacity can be a trustee (so it couldn't be a minor or a legally incompetent person). However, the trustee need not be a trust company or a trust specialist. Lawyers and accountants often act as trustees to QSFs.

A court must take jurisdiction over the QSF, but it need not be any particular court. In particular, it need not be a court having a connection to the legal dispute which is being resolved. Any court will do. Thus, you can go to the court that has jurisdiction over the underlying legal dispute, or you can go to a different court. You can use a state court in a federal matter, or vice-versa. You can even go to a probate court. Some advisers prefer this, since probate judges

are usually familiar with trusts and trust documents.

The defendant can have no interest in the trust. The defendant wants to claim its tax deduction right away and get out of the case. One of the requirements of the QSF is that, in order for the defendant to claim a tax deduction for the settlement payment, the defendant must relinquish all interest in the money.

Tax Treatment Of QSFs

A QSF must apply for and receive its own Employer Identification Number from the IRS. The QSF is taxed as a separate entity, basically like a corporation is taxed. Notably, however, the QSF is not taxed on contributions from one or more defendants to resolve the claims. Those are non-taxable contributions. The QSF is only taxed on the income it earns on those contributed funds. Usually, that means it is just taxed on interest and dividends.

Why Form A QSF?

There are many different circumstances in which forming a QSF makes sense. One circumstance is where the plaintiff and defendant are negotiating a settlement, but they cannot agree on the tax language or tax reporting to be included in the settlement agreement. Forming a QSF can be a nice bridge to such difficulties, allowing the defendant to simply pay over the money, and the plaintiff to worry about the form of the release the plaintiff will later sign with the QSF. You can look at a QSF as a kind of a tax-free way station.

Another circumstance where you may want to form a QSF is in a class action, where all of the plaintiffs haven't been identified. Alternatively, even if they have been identified, you may need to establish a claims procedure to determine exactly who gets what. Traditionally, QSFs were used mostly for class actions.

Today, however, that is no longer true. QSFs are still widely used in class actions, but you don't have to have a class action to have a QSF. You might just need more time to determine exact numbers, to fix final attorneys' fees and costs, and to facilitate structured settlements.

The QSF can facilitate structured settlements, generally involving the purchase of annuities that provide regular payments to plaintiffs for a term of years or for life. In fact, a desire for implementing structured settlements is a common reason for setting up a QSF. The plaintiffs may need time to determine the form of a structure, the exact annuity payout, family needs, etc. Not only that, but structures can be purchased for lawyers from a QSF too.

QSFs are flexible, and there is no express time limit on their duration. In my experience QSFs usually exist for a relatively short time, sometimes a matter of a few weeks or a few months. In simple cases, that can be enough time to determine who will get what, to investigate and select structured settlements, etc. In complex and large class actions, however, QSFs may exist for several years to resolve claims. There appears to be no outside time limit for how long a QSF can last.

As you evaluate the benefits of a QSF, bear in mind that there are broad statutory and non-statutory doctrines in our tax code—the most complex tax code in the world. People with a little tax knowledge find QSFs odd, since they seem to fly in the face of the normal constructive receipt and economic benefit doctrines that might suggest that plaintiffs and their lawyers are taxable when money is irrevocably set aside for them in a trust. The QSF truly operates as a tax-free holding pattern. Monies are not treated as received by the plaintiff(s) and lawyers until they are paid out of the QSF. Yet, the defendant is entitled to a tax deduction as soon as the money is put into the QSF.

Single Claimant QSFs?

One of the most controversial issues today is whether you can legitimately have a QSF with just one claimant. This is a real hot-button question. The statute itself and the treasury regulations suggest that a QSF should work fine if you have "one or more" claims. Thus, I would argue that a single claimant QSF is probably alright.

However, the IRS has repeatedly said it is studying this issue. Not only that, but some structured settlement industry insiders have urged Treasury to come down one way or the other on the point. Because of this, I urge caution.

We know that the statute seems to support single claimant funds, but there is no guidance. We also know the IRS is thinking about this issue. The structured settlement industry is quite polarized on this point. Personally, I always want to have at least two claimants, but there is even debate about what we mean by two or more claimants.

In considering what multiple claimants should mean, are husband and wife enough? What about lawyer and client, since the lawyer's share of the case generally also gets into the QSF? Optimally, of course, there will be two or more named claimants, but it is not crystal clear that is required.

This single claimant issue has become a kind of flashpoint in the structured settlement industry. Plaintiff brokers often feel they are frozen out of the process by defense brokers and insurance companies. As such, Plaintiff brokers may try to take control of the case (and therefore the commission on the structures) by forming a QSF.

Conversely, defense brokers also don't want to be frozen out of the process. If the money goes into a QSF, the defense broker may receive no commission. The insurance companies are also concerned. For one thing, they don't want to issue annuities from single claimant funds if it turns out single claimant funds are ineffective. Some insurance companies also seem to think that if monies go into a QSF, annuities may never be purchased.

The majority of these awkward issues can be worked out between cooperative parties, and commissions can certainly be shared. Yet, I still urge caution on the single claimant issue. Ultimately, I predict single claimant funds will eventually be allowed. Even if I'm wrong and they are disallowed, I think the disallowance is likely to be prospective only. Nevertheless, if you can avoid this issue entirely until it is resolved, you are better off.

Conclusion

QSFs are tremendously flexible, and their uses are increasing. Class action lawyers are used to these vehicles, but many lawyers (both plaintiff and defense lawyers) are surprised when they hear about the fundamental benefits of a QSF, which stand as a huge exception to fundamental constructive receipt and economic benefit tax rules. Both plaintiff and defense counsel can use a QSF for making the settlement process much smoother, much more efficient, and much more closely tailored to what the plaintiffs (and the plaintiff's counsel) really need and want.

Remarkably, in a QSF, monies can sit after the defendant(s) pay, but before the plaintiffs and plaintiffs' counsel have to report the money for tax purposes. A QSF can be very good for defendants too. I'm not suggesting QSFs are appropriate to settle every case. But I can tell you that they work great, and they can really save the day in some circumstances. ■

Robert W. Wood
Attorney at Law
Wood & Porter, PC
333 Sacramento Street
San Francisco, CA 94111-3601
phone - (415) 834-1800
fax - (415) 834-1888
wood@rwwpc.com
www.rwwpc.com

Robert W. Wood practices law with Wood & Porter, in San Francisco (www.woodporter.com), and is the author of *Taxation of Damage Awards and Settlement Payments* (3d Ed. Tax Institute 2005 with 2008 Update) available at www.taxinstitute.com.

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