

**REPORT AND LEGAL OPINION
OF
DANNA McKITRICK, P.C.
TO
THE TRUSTEES OF
THE POLICEMEN'S AND FIREMEN'S
PENSION PLAN
OF JOPLIN, MISSOURI
CONCERNING
UNDERFUNDING ISSUES**

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**REPORT TO THE TRUSTEES OF THE
POLICE AND FIREMEN'S PENSION PLAN OF JOPLIN, MISSOURI
CONCERNING UNDERFUNDING ISSUES**

INTRODUCTION

The Fiduciary Duty of Trustees

The Trustees of the Joplin Policemen's & Firemen's Pension Plan (sometimes the "Plan") are to be commended for obtaining this Legal Opinion and Report. As will be stated in the body of the Report, it is our belief that the Trustees must take action as a result of the past and present underfunding of the Plan by the City of Joplin, which jeopardizes pension benefits for past, present and future participants and beneficiaries.

The Trustees, including the Mayor and mayoral appointees, should be aware that they are fiduciaries. See Section 7.01(B). The term "trustee" itself conveys this meaning and the position of trustee carries great responsibility. If fiduciaries breach their duties, they may be subject to being sued for that breach. The Plan provides:

Fiduciaries shall act with the care, skill, prudence, and diligence under the circumstances that a prudent person, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of like character and with like aims.

Section 7.02.

Rather interestingly, Section 7.01(A) provides that the City of Joplin (through the City Council) is also a fiduciary. The failure to fully fund at actuarially required levels is a breach of fiduciary duty by the City Council. Current council members will be joined as named individual defendants in any litigation, due to their breach of fiduciary duty, in that an action for a declaratory judgment and injunction would be part of the remedies sought by the Trustees. Council members should not be indemnified for their actions or inactions. Although section 10.07 provides indemnity to the Trustees in most circumstances, there is no guaranty of indemnification for members of the City Council in their capacity as fiduciaries of this Pension Plan.

Trustees are "bound to perform strictly in compliance with the trust instrument by which their powers and duties are determined." *Trustees of Forestgreen Estates v. Minton*, 510 S.W.2d 800, 804 (Mo. App. E.D. 1974). The Trustees have authority to do all things "necessary or reasonably required to carry out and make effective the specific powers" granted to them in the Plan. Section 7.05. Their powers as fiduciaries include commencing or defending lawsuits or administrative proceedings, and representing the Plan in lawsuits and legal administrative proceedings. Section 8.03(H).

"The role of a trustee is to discharge the trust purpose, as that imperative appears from the trust instrument." *Ray County v. Heath*, 636 S.W.2d 413, 417 (Mo. App. W.D. 1982). The purpose of the Plan, as stated in its introduction, is "to provide retirement and disability benefits for eligible

employees who become Participants in the Plan, and Death Benefits for Beneficiaries of deceased Participants.” The availability of these benefits to participants and beneficiaries is at risk; and the Trustees must discharge their duties in order to accomplish this stated purpose.

It is our opinion that the Trustees have a fiduciary duty to ensure that the City of Joplin properly funds the Plan for the benefit of its present and future beneficiaries. This duty includes an obligation to file suit against the City and those individuals who are charged with funding this Plan. That will be the primary focus of this Report.

The initial section of the Report will present key facts and legal issues relating to the severe underfunding of the Plan.

The Report will also discuss the additional, State-imposed “death penalty” provisions contained in the newly enacted Missouri statutes §§ 105.683 and 105.684 R.S.Mo.

I. THE UNDERFUNDING PROBLEM

Attached as Exhibit A to this Report are materials from the Joint Committee on Public Employee Retirement. These materials relating to Joplin are part of a study undertaken by a committee of the Missouri House and Senate (i.e., JCPER, chaired by Senator Jason Crowell). Exhibit A shows the Policemen's and Firemen's Pension Plan of Joplin to have a funded ratio of 58%, based on market value, and 59% based on the actuarial value of the assets.

Attached as Exhibit B is the Actuarial Valuation, as of November 1, 2006. A chart on page 31 sets forth the Schedule of Funding Status. That chart also appears below.

| (1) | (2) | (3) | (4) | (5) | (6) | (7) |
|--------------------------------|--------------------------------------|--|--|-----------------------------------|------------------------------|--|
| Actuarial Valuation Date | Actuarial Value of Plan Assets | Actuarial Accrued Liability (AAL) | Unfunded Actuarial Accrued Liability (UAAL) (Col. 3-Col. 2) | Funded Ratio (Col.2/Col. 3) | Annual Covered Payroll | UAAL as a Percentage of Payroll (Col. 4/Col. 6) |
| 11/1/1997 | 11,615,000 | 17,705,000 | 6,090,000 | 65.6% | 4,518,000 | 134.8% |
| 11/1/1998 | 12,729,000 | 18,383,000 | 5,654,000 | 69.2% | 4,526,000 | 124.9% |
| 11/1/1999 | 13,909,000 | 18,970,000 | 5,061,000 | 73.3% | 4,823,000 | 104.9% |
| 11/1/2000 | 15,306,000 | 25,591,000 ¹ | 10,285,000 | 59.8% | 5,114,000 | 201.1% |
| 11/1/2001 | 16,013,559 | 27,009,397 | 10,995,838 | 59.3% | 5,502,868 | 199.8% |
| 11/1/2002 | 16,775,548 | 28,525,157 | 11,749,609 | 58.8% | 5,872,673 | 200.1% |
| 11/1/2003 | 17,796,728 | 30,086,731 | 12,290,003 | 59.2% | 5,943,864 | 206.8% |
| 11/1/2004 | 18,759,224 | 32,073,023 | 13,313,799 | 58.5% | 6,092,384 | 218.5% |
| 11/1/2005 | 19,722,351 | 33,384,405 | 13,662,054 | 59.1% | 6,185,242 | 220.9% |
| 11/1/2006 | 21,123,764 | 37,043,414 ² | 15,919,650 | 57.0% | 6,091,388 | 261.3% |

¹ Liabilities increased significantly in the 11/1/2000 valuation due to a benefit improvement.

² Liabilities increased significantly in the 11/1/2006 valuation due to assumption changes.

Column 5 contains a listing of funded ratios, which is the actuarial value of Plan assets divided by the actuarial accrued liability. During the late 1990s, the funded ratio was between 65.6% and 73.3%. Beginning in the year 2000, the funded ratio fell below 60% and has never returned above that number. The most recent actuarial valuation number contained in that report shows a 57% funded ratio. Clearly, there is a significant, ongoing underfunding problem present with respect to this Plan. Moreover, the underfunding has had a significant impact on the funded ratio and Plan assets, even though investment returns have been very respectable during the last five (5) years.

We also enclose, as Exhibit C, the Actuarial Valuation Report as of November 1, 2005. It is included merely because it was apparently the basis for the Rudd and Wisdom, Inc. letter to Leslie Jones, dated February 16, 2007. The Rudd and Wisdom letter is attached as Exhibit D.

When we were initially contacted by the Trustees, before we were formally selected pursuant to the RFQ process for a full analysis of underfunding issues, we sent a letter to the Trustees, dated September 10, 2007. A copy of that letter is attached as Exhibit E. Since that time, we have had the opportunity to engage in substantial, additional research and investigation.

II. THIS PENSION PLAN CONFERS GUARANTEED CONTRACTUAL RIGHTS

As noted in our September 10th letter, the recent victory that our firm obtained on behalf of the Firemen's Retirement System of St. Louis in the Missouri Supreme Court affirms that principles of "actuarial soundness" have been accepted by the Supreme Court as a standard applicable to public pension plans. The Supreme Court's holding in *Neske, et al. v. City of St. Louis, et al.*, also implicitly affirms the contractual nature of public pension benefits in Missouri.

There had been a long-standing, unresolved issue in Missouri with respect to some pension plans, that is, whether plan benefits were contractual in nature, or were mere gratuities provided by an employer. See, *Tomlinson v. Kansas City*, 391 S.W.2d 850 (Mo. 1965). The *Neske* case, in our opinion, has put an end to that debate. With respect to Joplin's Policemen's and Firemen's Pension Plan, however, this controversy was really never an issue. Section 9.01(A) concerns amendments to the Plan. Any amendment requires a majority vote of participants. Section 9.01(A) also provides:

No amendment shall authorize or permit any part of the trust fund to be diverted for purposes other than for the exclusive benefit of participants and their beneficiaries. Also, no amendment shall have the effect of revesting in the City any portion of the trust fund.

Thus, it is clear that all money in this Pension Plan belongs to the participants and beneficiaries, so a "mere gratuity" argument has no application to this Plan for the benefit of police officers and firefighters. The benefits promised under the Plan seem, by virtue of the Plan provisions, to be a contractual right. Section 5.08 of the Joplin Home Rule Charter also confirms the contractual status of these various benefits. It would seem extraordinary to expect police officers and firefighters to vote or consent in writing to reduce their benefits.

Because of the failure of the City to fund the Plan properly, the City has become subject to Sections 105.683 and 105.684 RSMo. They will be discussed later. However, no new benefits can be conferred unless the Plan's actuary determines that "the funded ratio, prior to such adoption or implementation, is at least eighty percent and will not be less than seventy-five percent after such adoption or implementation." Section 105.684(1) R.S.Mo. Given this circumstance, it is our strong opinion and recommendation that no trustee or other fiduciary engage in any discussion regarding reduction of benefits, or tolerate or permit such attempted reduction. To do so may well constitute a breach of fiduciary duty.

Given these facts and the pertinent ordinance and charter provisions, we will not engage in an extended analysis of the implications of the *Neske* case regarding contractual rights. In that regard, see our website concerning my article published in Public Pensions On Line. That article has also been published in Pension International Magazine, London, England, a copy of which is attached as Exhibit F. A shorter version of the article has just been published in the November Journal for the National Association of Public Pension Attorneys and is attached as Exhibit G. A copy of the Supreme Court's decision in *Neske, et al. v. City of St. Louis, et al.*, is attached to this Report as Exhibit H. The trial court's Opinion and Judgment and the Missouri Court of Appeals,

Eastern District, decision concerning the *Firemen's Retirement System* case, that formed part of the *Neske* case, are also available for review on our website, www.dannamckitrick.com.

III. PROBLEMS FACED BY THE CITY DUE TO UNDERFUNDING

The problems facing the City of Joplin regarding this Plan are multiple. First, the benefits are established in the format expected for a defined benefit (“DB”) plan. That is, certain specific benefit amounts are promised to participants based on calculations set forth in the ordinances in the event of retirement, disability or death. However, the funding mechanism is based upon a flat percentage rate, pursuant to City ordinance. This mechanism is similar to “defined contribution” (“DC”) -type funding. Since the Plan promises benefits that are guaranteed, and since there are no segregated accounts for individual participants, it is clear that this is a defined benefit plan. If the Plan were not underfunded, the technical method of funding would pose only an intellectual problem, because the fixed rate of payroll funding and the promise of guaranteed benefits are inconsistent. Ordinance-based DC funding could perhaps be a viable funding mechanism, if the Plan had no unfunded actuarial liability, because that ordinance-based funding could equal, or approximate, actuarially recommended or required funding. Given the Plan’s current underfunded status, however, this flat level, ordinance-based funding approach does not work and the inconsistency creates significant problems in the real world. It also violates fiduciary duties of the Mayor and the Council, as previously discussed in this Report.

Second, the most recent actuarial valuation of November 1, 2006, shows that, actuarially, 32.67% of payroll was required in order to fund this Plan consistent with actuarial calculations and actuarial soundness. However, the most recent City ordinance concerning funding provides for a contribution by the City at only 17% of payroll. Thus, there was a shortfall on 15.67% of payroll in the City’s contribution. This is a major gap in funding and perpetuates the dramatic underfunding problem, which affects the viability of the Plan. Absent exceptional and unlikely investment returns, if there is not a substantial increase in funding by the City of Joplin, the Plan will deteriorate and become more underfunded, assuming other actuarial variables remain relatively constant. The level percentage of payroll that the City currently contributes pursuant to ordinance is insufficient to cover the promised benefits, in the long term, and is contrary to applicable law.

Third, regarding the contributions needed and required from the City, it should be noted that the Rudd and Wisdom letter concluded that the City’s required funding contribution is understated by about 7% of payroll, given the outdated mortality tables being used by EFI Actuaries. In the Rudd and Wisdom report this 7% increase was somewhat offset by suggestions to use an amortization period longer than the 15 years currently being used. Apparently, the experience study showed that Joplin police officers and firefighters die at an earlier age than the general population. This may justify ongoing use of the present mortality table. I am advised that recently the Trustees did agree to adopt a 30 year amortization. Thirty years is permitted by GASB, but the exact method of amortization must comply with the newly enacted provisions of Sections 105.683 and 105.684. These provisions are described later in this Report.

Fourth, consultation should also occur between the City and its actuaries and auditor, concerning GASB requirements for disclosure of current pension underfunding on the City’s financial statements. Present underfunding could very well negatively impact the presentation of City finances and decrease the quality of the City’s bond rating. Again, that is not our area of expertise, but should be considered by the City as it evaluates this problem. These GASB changes are recent and, therefore, their full effects are only now being felt by cities and other governmental

units. Applicable GASB provisions and their significance are part of the recent report of the Federal Government Accounting Office (GAO) study, pertinent parts of which are attached as Exhibit I.

If resolution of this underfunding problem cannot be accomplished by the City agreeing to improve its funding ratio through a large lump sum contribution now and/or an aggressive increase in annual funding contributions to meet or exceed actuarial calculations required of the City, then litigation will almost certainly be necessary and will be recommended.

IV. ARTICLE VI, SECTION 25, AND THE SUPREME COURT'S DECISION IN NESKE, MANDATE THE CITY ANNUALLY PAYING THE AMOUNT CALCULATED BY THE ACTUARY, BASED ON PRINCIPLES OF ACTUARIAL SOUNDNESS.

As noted earlier in this Report, the City has failed to fund the Plan in accordance with the recommendations of the actuaries. We expect that the City may take the position that it has properly funded the Plan, because it has paid the percentage of payroll figure as articulated in § 6.02, as periodically amended. The City's analysis in this regard is wrong for several reasons.

The Plan documents confirm that existing beneficiaries are receiving cost of living adjustment (COLA) benefits. These were discontinued in the past, but the Plan has had to take into account COLA issues in all recent years, even though their recent economic impact on the Plan has not been very significant. Article VI, § 25, of the Missouri Constitution, was amended in 1984 to provide that political subdivisions:

may provide for the payment of period cost of living increases in pension and retirement benefits paid under this section to its retired officers and employees and spouses of deceased officers and employees, provided such pension and retirement systems will remain actuarially sound.

Thus, as a matter of constitutional law, the City of Joplin has violated Article VI, § 25, of the Missouri Constitution, by maintaining a retirement or pension plan, but failing to guarantee that it remains actuarially sound.

It should be noted that the St. Louis City Police and Firemen's Retirement Systems, the Plaintiffs in *Neske*, were funded at ratios of approximately 90% at the time of the litigation and at the time of the Supreme Court's decision. The City of Joplin's Policemen's and Firemen's Pension Plan is, of course, below 60% funding, and was targeted within the class of "troubled" pension plans subject to the recent State statutes.

Beyond this literal constitutional language, the Supreme Court, in *Neske*, said that the language of those police and firefighter retirement plans seemed founded upon principles of actuarial soundness. For reasons that will be discussed later in construing the pension ordinances, the same is present in this Plan.

The statutes and ordinances relating to the PRS and the FRS, when taken as a whole, support the view that actuarial soundness is the principle at the heart of the PRS and the FRS funding provisions. Actuarial soundness requires the City to make its annual contribution of the actuarially-determined amounts certified by the PRS and the FRS boards of trustees.

Neske, at 426.

For further detailed analysis on the implications of the *Neske* case, see the attached articles, which I have authored, marked as Exhibits F and G.

Based upon both the constitutional requirement in Article VI, § 25, and the holding in the *Neske* case, it is our opinion that the Trustees have a valid cause of action with a significant probability of success, if suit were to be brought against the City of Joplin for its failure to fund the Plan in accordance with actuarial standards in recent times. Our analysis has concluded that a ten (10) year statute of limitations is most likely applicable because of the general provision in Missouri law that allows for lawsuits up to ten (10) years where there is a written promise to pay. § 516.110(1) R.S.Mo. A five (5) year statute of limitations may also be appropriate, based upon some cases construing ordinances and, given ambiguities within the pension ordinances relating to guaranteed benefits that are funded at a flat ordinance-based rate. § 516.120 R.S.Mo. Nevertheless, the amount which could be recovered in each year is the difference between the amount the actuaries said the City should pay in each of those years versus the amount the City did, in fact, pay.

In addition, the City's failure to properly pay those sums in past years has resulted in a shortfall, due to loss of earnings on the money that the City failed to contribute. Therefore, the Trustees have an additional remedy which may be stated and pled in one of two ways. Missouri allows pre-judgment interest at the rate of 9% on sums, like these, which are easily calculable. Pre-judgment interest would be included in the claim(s) for money damages. Alternatively, a separate claim could be brought by the Trustees, based on loss of earnings. These amounts could be calculated either based upon the actuarial assumption of the 7% annual rate of return, or based upon the returns generated by the Pension Plan in those more recent years.

The lawsuit for recovery from past years would be in the form of a lawsuit for money damages against the City of Joplin, but would include a count for declaratory judgment concerning Joplin's duty to fund at actuarially required levels, in the past, for the present years and into the future. A count for injunction to mandate funding at actuarial levels would also be filed, or included in the declaratory judgment claim.

It is my further recommendation that the Trustees allow the City of Joplin sufficient time until the Trustees' first January meeting to make a proposal that is acceptable and solves the underfunding problem. If such a recommendation does not produce an agreement that is, or will be, promptly implemented, it will be my recommendation that a lawsuit be filed.

Because of the inconsistent provisions concerning guaranteed benefits and ordinance-based non-actuarial levels of funding, I also recommend the Trustees include claims seeking a declaratory judgment based on the ordinances themselves, seeking orders to compel the City to pay the actuarially calculated amounts, based purely on the ordinance provisions. That analysis follows.

V. **LEGAL CAUSES OF ACTION BASED UPON ORDINANCES, DUE TO JOPLIN'S FAILURE TO PROPERLY FUND THE POLICEMEN'S AND FIREMEN'S PENSION PLAN**

As noted earlier in this Report, members of the City Council, by definition, are fiduciaries of the Plan. The existence of this fiduciary duty on the part of the City Council may explain why the drafters of the ordinance believed it was permissible to draft contributions in terms of a flat percentage of payroll, rather than on an actuarial basis. The City Council, with its fiduciary obligations, would be, and is, under a duty to increase the amount in accordance with the actuaries' calculations, so that the Plan remains actuarially sound. As evidenced by the fact that Joplin is now within a status of "troubled" plans, as defined by the State of Missouri, clearly these fiduciary obligations of past and present Council members have not been met.

Furthermore, in analyzing the City's duty to fund the Plan beyond the amounts specified in Section 6.02, an analysis needs to be done with respect to Section 7, especially the provisions of Section 7.05. That Section provides, in pertinent part, as follows:

7.05 ADMINISTRATIVE POWERS, DUTIES AND RESPONSIBILITIES

The Board of Trustees shall administer the Plan for the exclusive benefit of the Participants and their Eligible Spouses and Qualified Children, subject to the specific terms of the Plan. The Board shall have the power to determine all questions arising in connection with the administration, interpretation, and application of the Plan. Any such determination shall be conclusive and binding upon all persons. The Board may establish procedures, correct any defect, supply any information, or reconcile any inconsistency in such manner and to such extent as shall be deemed necessary or advisable to carry out the purpose of this Agreement; provided, however, that any procedure, discretionary act, interpretation of construction shall be done in a non-discriminatory manner based upon uniform principles consistently applied and shall be consistent with the intent that the Plan shall continue to be deemed a qualified plan under the terms of Code Section 401(a), and shall comply with the terms of the Act and all regulations issued pursuant thereto. The Administrator shall have all powers necessary or appropriate to accomplish his duties under this Plan.

The Trustees shall be charged with the duties of the general administration of the Plan, including, but not limited to, the following:

• • •

- (E) **to interpret the provisions of the Plan and to make and publish such rules for regulation of the Plan as are consistent with the terms hereof;**

• • •

The enumeration of the specific powers and authority of the Board of Trustees herein shall not be construed in limitation of its powers and authority to do all other things necessary or reasonably required to carry out and make effective the specific powers herein granted.

(Section 7.05) (emphasis added).

Section 7, especially Section 7.05, demonstrates that it is the responsibility of the Board of Trustees to act for the exclusive benefit of the Participants and their eligible spouses and qualified children, subject to the specific terms of the Plan. All Trustees are subject to this obligation and fiduciary duty.

The rules of ordinance construction parallel the rules of statutory construction. Ordinances are to be construed consistently, taking into account all ordinance provisions and attempting to fulfill the purpose of the ordinance. Clearly, the purpose of this Plan and these ordinances is to provide pension benefits, disability benefits, and other enumerated benefits, to police officers, firefighters, retired police officers and firefighters, and the widows and children of deceased police officers and firefighters, and such other beneficiaries as are provided for in the Plan.

Finally, regarding Section 7.05, we were not requested to address the effect that the City's underfunding and the ordinance-based "flat rate" contributions have upon IRS qualification or the status of this Plan as a qualified plan under Code Section 401(a). That issue bears further investigation.

VI. STATUTORY, STATE-ENFORCED, NON-LITIGATION REMEDIES
(A legal analysis of Chapter 105 RSMo. and its mandates for Joplin to
pay based on sound actuarial calculations to correct the severe
underfunding problems.)

The Trustees are required to rely upon and abide by Missouri statutes to impose actuarial requirements on the Plan in order to keep contributions consistent with benefit payments and maintain actuarial soundness. Missouri Revised Statutes Chapter 105, entitled “Public Officers and Employees - Miscellaneous Provisions”, includes numerous sections directly applicable to retirement plans established for the benefit of public employees. Joplin’s Plan is covered by the provisions and requirements of Chapter 105.

Most notably, the legislature passed two new laws as part of S.B. 406. These sections, 105.683 and 105.684 R.S.Mo., apply directly to plans that are either underfunded or proposing new benefit increases, and mandate actuarial valuations in both situations. Thus, the State of Missouri has now targeted plans such as Joplin’s, which are severely underfunded, by virtue of these sections. Those sections are attached as Exhibit J. Section 105.683 provides:

Any plan, other than a plan created under sections 169.010 to 169.141, RSMo, or sections 169.600 to 169.715, RSMo, whose actuary determines that the plan has a **funded ratio below sixty percent and the political subdivision has failed to make one hundred percent of the actuarially required contribution payment for five successive plan years with a descending funded ratio for five successive plan years after August 28, 2007, shall be deemed delinquent** in the contribution payment and such delinquency in the contribution payment shall constitute a first lien on the funds of the political subdivision, and the board as defined under section 105.660 is authorized to compel payment by application for a writ of mandamus; and in addition, such delinquency in the contribution payment shall be certified by the board to the state treasurer and director of the department of revenue. Until such delinquency in the contribution payment, together with regular interest, is satisfied, the state treasurer and director of the department of revenue shall withhold twenty-five percent of the certified contribution deficiency from the total moneys due the political subdivision from the state.

(emphasis added).¹ This section defines delinquent plans as those: (1) funded below 60% and (2) where a city failed to make complete “actuarially required” contributions for five years with a descending funding ratio for five years beginning in 2007. The section twice refers to actuarial valuations of plans, first stating that a plan’s funding ratio would be determined by the plan actuary. The more important reference to actuarial valuation is the second, in which the legislature refers to

¹ Sections 169.010 to 169.141, RSMo, or sections 169.600 to 169.715, excluded from the provisions of this section, are statutes establishing plans for Missouri teachers and other public school employees. Thus, they do not impact the analysis for Joplin’s purposes.

“actuarially required” contributions by political subdivisions. Making the “actuarially required” contribution is an essential factor in determining whether or not a plan is considered delinquent. This language expresses the requirement that cities and towns make contributions pursuant to the actuaries’ funding calculations, rather than pursuant to an ordinance providing a flat percentage of payroll, as has occurred in Joplin.

This statute seems to impose a more stringent form of amortization than has been used by Joplin in the past. Discussions of recent amortization procedures are found in the Actuarial Valuation Report as of November 1, 2006, on page 4. A 15-year “open” period has been used, but this was recently changed to 30 years. The actuary should confirm whether the format of the present 30 year amortization conforms to the newly enacted statutory requirements.

The 60% funding figure is also significant from the perspective of State-enforced remedies, or punishments, that will be imposed upon Joplin if this underfunding problem is not fixed. If a political subdivision, such as Joplin, has failed to make 100% of the actuarially required contribution payments for five successive plan years, with a descending funding ratio for five successive plan years, then Joplin will be deemed delinquent for State-enforced remedy purposes. Until the delinquency is paid, with interest, the State will withhold 25% of the certified contribution deficiency from funds that the State owes to the employer, in order to help fund the Plan. In addition, the statute provides that the plan can compel payment by way of a writ of mandamus, which is a type of lawsuit that seeks an order from the court directing public officials to take certain action, or in this case, to properly fund a delinquent plan.

Because the five-year time line for determining proper funding begins in 2007, cities may well argue that these State-imposed remedies are not available until the passage of five years. In our opinion, Joplin and its elected officials would make a serious mistake if it adopted a delay strategy based on this argument. The continued underfunding would result in a “snowball” effect, creating a large and more burdensome contribution level in future years.

Therefore, if the City of Joplin fails to follow the provisions of Section 105.683 with respect to the upcoming year, we would recommend immediately contacting State officials about Joplin’s non-compliance with this Section. In order to comply for “five successive years”, of course a city has to comply in the first year. If it fails to comply in the first year, then it cannot comply for five successive years after August 2007, as is required by Section 105.683.

This legal approach is similar to the concept of anticipatory breach of contract. When a party makes it unequivocally clear that it is not going to perform under the contract, the other party is not required to sit around and wait for time to lapse, but rather, may sue immediately under the concept of anticipatory breach.

If Joplin decides to play a delay or “restart the clock” game, I would certainly recommend that the Trustees contact Senator Jason Crowell and the State Auditor and request an investigation of Joplin. The Trustees could also certify the delinquency to the State Treasurer and the Director of the Department of Revenue, as provided in Section 105.683. These State government-enforced remedies are in addition to, and do not preclude, the litigation remedies previously discussed in this Report.

If the City of Joplin fails to negotiate in good faith and agree to an acceptable solution in the near future, a recommendation of litigation will be forthcoming. No reason exists to wait for the State-enforced remedies. This Plan is troubled and needs funding now.

VII. CONCLUSION

The City of Joplin has failed to properly fund the Policemen's and Firemen's Pension Plan. It is actuarially unsound and this violates Article VI, Section 25, of the Missouri Constitution and the Supreme Court's holding in *Neske*. Also, the ordinances creating and establishing this pension plan indicate the City must fully fund in accordance with, and in the amount of, the actuarial calculations. It is clear Joplin has failed to do this in the past, and Joplin has not expressed an intent to change its improper and illegal funding going forward.

The above reasons or theories make clear that the Trustees can sue Joplin, if Joplin fails to quickly reach agreement to appropriately fund the Plan. Furthermore, if Joplin fails to do so, it is our opinion that the Plan Trustees have a **fiduciary duty** to file suit to seek judgment against Joplin for money damages, declaratory relief and injunctive relief. With respect to past money damages from November 1, 2001 to present, the amount sought will exceed \$2,000,000. See attached Exhibit K, prepared by Graham Schmidt of EFI. These numbers are only through November 1, 2005. The November 1, 2006 actuarial report required funding at 32.67%. Based on a covered payroll of \$6.4 million, there would be an additional \$1,002,880.00 of underfunding. Also, there would be over \$70,000 in additional interest on the prior underfunding of \$1,025,213.00. Thus, the back due amount exceeds \$2 million.

Though we recommend giving Joplin until the January Trustees meeting to come up with an acceptable solution to this problem, we will recommend litigation, if there are not significant meaningful steps taken by Joplin to solve the underfunding problem. Based on information currently in our possession, it is our belief and opinion that the Trustees would prevail in this litigation against the City of Joplin and the Joplin City Council Members.

In addition, if Joplin fails to comply with Sections 105.683 and 105.684 R.S.Mo., very severe state-imposed penalties will become applicable. These penalties are in addition to the litigation-based remedies discussed above.

Respectfully submitted to the Trustees,

DANIEL G. TOBBEN