overhead. Of these, the major variable risk component by far is the contractor’s management, supervision, and labor costs (including those of its principal sub-contractors). Claims based on increases in a contractor’s management and labor costs due to delay or acceleration are commonly measured by the disruption of the contractor’s workforce in terms of loss of labor efficiency and productivity. Labor productivity is expressed in man-hours per unit of work produced (labor productivity = man-hours/unit of work). If more man-hours are needed to produce a unit of disrupted or impacted work than prior to an alleged disruption, the result is a loss of productivity. William Schwartzkopf, Calculating Lost Labor Productivity in Construction Claims 3–5 (Aspen 2d ed. 2004).

**E**

**Early Finish.** In the construction industry proper scheduling of the numerous different parts of the work taking place sequentially or simultaneously is vital to a successful project. One common scheduling method is known as the critical path method (CPM). In a CPM schedule, the phrase “early finish,” “earliest finish,” or “early finish date” refers to the first possible point at which the as-yet-to-be-completed elements of a scheduled activity (or, depending on the particular context, the entire project as a whole) may potentially be completed. The early finish date is arrived at through usage of the project schedule network logic, as well as accurately factoring in any known or predictable scheduling constraints.

The earliest time an activity may be completed is equal to the early start of the activity plus its remaining duration. While the early finish date can be created and/or established at an early point in the project planning process, the early finish date will likely be modified multiple times throughout the life cycle of the project, particularly as (i) the project advances into different stages, (ii) unanticipated delays occur, and (iii) changes are made to the project scope of work. These modifications are typically noted on the monthly project schedule updates (in ideal cases, including being ahead of schedule). See 5 Phillip L. Bruner & Patrick J. O’Connor, Jr., Bruner and O’Connor on Construction Law § 15:8 (2002).

**Early Neutral Evaluation (ENE).** Early neutral evaluation (ENE) is a method of dispute resolution akin to a mini-trial. The U.S. District Court, Northern
District of California, ADR Program (ADR Local Rule 5) describes ENE as follows:

The goals of ENE are to: enhance direct communication between the parties about their claims and supporting evidence; provide an assessment of the merits of the case by a neutral expert; provide a “reality check” for clients and lawyers; identify and clarify the central issues in dispute; assist with discovery and motion planning or with an informal exchange of key information; and facilitate settlement discussions.

ENE aims to position the case for early resolution by settlement, dispositive motion or trial. The Northern District ENE may serve as a cost-effective substitute for formal discovery and pretrial motions. Although settlement is not the major goal of ENE, the process can lead to settlement.

The evaluator, an experienced attorney with expertise in the case’s subject matter, hosts an informal meeting of clients and counsel at which the following occurs: (1) each side—through counsel, clients, or witnesses—presents the evidence and arguments supporting its case (without regard to the rules of evidence and without direct or cross-examination of witnesses); (2) the evaluator identifies areas of agreement, clarifies and focuses the issues, and encourages the parties to enter procedural and substantive stipulations; (3) the evaluator writes a private evaluation that includes an estimate, where feasible, of the likelihood of liability and the dollar range of damages; an assessment of the relative strengths and weaknesses of each party’s case; and reasoning that supports his assessment. The evaluator has no power to impose settlement and does not attempt to coerce a party to accept any proposed terms. The parties’ formal discovery, disclosure, and motion practice rights are fully preserved. The confidential evaluation is nonbinding and is not shared with the trial judge.

The American Arbitration Association, in its publication *AAA Resolution Services—Early Neutral Evaluation: Getting an Expert’s Assessment* (2005), describes the ENE process as a forum that “encourages direct communication between adversarial parties about possible claims and supporting evidence—particularly important in situations where the disputants are far apart in their views on the evidence and how the law applies to the facts in question or what
The case is worth . . . .” The Early Neutral Evaluation process can be triggered by written agreement in the parties’ contract or by mutual agreement if such a settlement procedure is not contemplated by their contract.

Once the process has been initiated, the parties are given a list of potential neutral evaluators who possess the required expertise to hear the dispute. The parties then mutually agree upon an evaluator. The evaluator first arranges with the parties an appropriate schedule for exchanging written initial statements. Generally, an initial statement describes the substance of the dispute, the party’s view of the critical liability and damages issues, important evidence, and any other information that may be useful to the evaluator. The evaluator and the parties normally also agree to the length and extent of the initial written statements.

At the evaluation (generally, in-person), each party presents its claims or defenses and describes the principal evidence on which its claims or defenses are based. The evaluation session is informal and the rules of evidence do not apply. There is no formal examination or cross-examination of witnesses, and the presentations and discussions are not recorded. Generally, a written evaluation is rendered approximately 14 days after the evaluation concludes.

**Easement (or Right of Way).** Construction projects often impact adjacent property, making it critical for project owners and contractors to make sure they have appropriate rights to use or impact adjacent property. Often the use or impact for a construction project requires only limited rights, not outright ownership and control of the adjacent property. One important form of a limited right to use or impact the property of another is an easement. “An easement is merely the right to use the land of another.” *Drees Co. v. Thompson*, 868 N.E.2d 32, 41 (Ind. Ct. App. 2007). “An easement is neither an estate in land nor the “land” itself. It is, however, property or an interest in land. Thus, an easement is real property.” 25 Am. Jur. 2d *Easements and Licenses* § 2 (2010).

Failing to have the requisite rights to use or impact adjacent property can create liability or severe problems for participants in a construction project, including liability for trespass, requirements to tear down buildings constructed on adjacent property, work shutdowns, and the need to use more expensive alternative methods of construction. Easements or some other form of permission to use adjacent property could be needed for a number of situations. The project may need to run permanent utility lines over adjacent property in order to have service for the project; the contractor may need to construct temporary scaffolding on adjacent property; limited space on-site may require the use of adjacent property for storage or staging areas; access for construction equipment may
ECONOMIC LOSS DOCTRINE

require use of adjacent property; the contractor may need to swing the boom of its crane and the loads it lifts through the airspace above adjacent property; shoring may impact or require the use of adjacent property; or the contractor or owner may need to temporarily or permanently divert runoff onto adjacent property. Easements are an important form of property right that can be used to provide the necessary permission to use adjacent property in these situations. See generally Carina Y. Ohara et al., Forms & Substance: Specialized Agreements for the Construction Project (ABA 2007).

Economic Loss Doctrine. Many jurisdictions have adopted this doctrine, which is a rule of law barring a claimant from recovering purely economic losses from a defendant with whom the claimant did not have contractual privity unless the claimant suffered personal injury or physical property damage. The modern version of the doctrine was articulated in Seely v. White Motor Co., 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965), a case involving a claim by the buyer of goods. Economic losses are losses that are financial; economic losses include losses for such things as diminished value, additional or increased costs of construction, costs of corrective work, costs to replace defective products, unpaid contract balances, and overhead and profit. Physical injuries such as bodily injury or physical property damage are not economic losses. Most other types of damages are economic losses. As one court described it, “‘Economic losses’ occur when there is no personal injury and no physical harm to other property.” Gunkel v. Renovations, Inc., 822 N.E.2d 150, 153–54 (Ind. 2005).

In construction, there are many parties involved in a project, all interdependent on each other even though they do not all have contracts with everyone involved on the project. A major issue is whether to apply the economic loss doctrine to protect a party on a construction project from the claims of another harmed by the actions of the party for purely economic losses even though there was no contract between the two. A number of jurisdictions have used the economic loss doctrine to bar recovery of economic losses when the claimant did not suffer personal injury or physical property damage and did not have a contract with the defendant. See, e.g., BRW, Inc. v. Duffy & Sons, Inc., 99 P.3d 66 (Colo. 2004) (subcontractor’s tort claims against engineer and inspector for economic losses were barred by the economic loss doctrine); Gunkel v. Renovations, Inc., 822 N.E.2d 150 (Ind. 2005) (homeowners were barred from recovering for economic losses from mason for economic losses under tort theory, but were allowed to recover under claim for breach of contract); Lord v. Customized Consulting Specialty, Inc., 643 S.E.2d 28 (N.C. Ct. App. 2007) (homeowners were
barred by economic loss doctrine from recovering from truss subcontractor in negligence for damages to the trusses themselves as those were economic losses, but they were allowed to recover for physical damage to other portions of their homes; *Rotonda Condominium Unit Owners Ass’n v. Rotonda Associates*, 380 S.E.2d 876 (Va. 1989) (economic loss doctrine precluded condominium homeowners’ association from recovering economic losses from condominium developer under tort theories and left as the association’s only recourse recovery under breach of contract or statutory warranties); *Alejandre v. Bull*, 153 P.3d 864 (Wash. 2007) (economic loss doctrine barred claims by home purchasers against developer for fraud and misrepresentation).

A number of other jurisdictions reject the economic loss doctrine in connection with service providers and have allowed contractors or others to sue service providers, such as architects and engineers, for economic losses without being in privity of contract and without suffering personal injury or property damage. See, e.g., *Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999) (economic loss doctrine did not bar homeowner’s claims for negligent inspection against an engineer despite the lack of a contract between the two parties); *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397 (Fla. 1973) (a general contractor who may foreseeably be injured and sustain economic losses caused by an architect or engineer’s negligent performance of a contractual duty may recover from the architect or engineer even though the contractor is not the one that has the contract with the architect or engineer), limited by *Casa Clara Condominium Ass’n v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993) (economic loss doctrine barred claims for purely economic losses by homeowners against a product supplier (a concrete supplier) with whom they did not have a contract); *Farrell Construction Co. v. Jefferson Parish*, 693 F. Supp. 490 (E.D. La. 1988) (contractor allowed to pursue negligence claims for economic losses against engineer despite lack of privity); *Prichard Bros., Inc. v. Grady Co.*, 428 N.W.2d 391 (Minn. 1988) (contractor allowed to pursue negligence claims for economic losses against engineer despite lack of privity); *Jim’s Excavating Services, Inc. v. HKM Associates*, 878 P.2d 248 (Mont. 1994) (contractor could recover for purely economic losses from an engineer for negligent design and supervision even though the contractor did not have a contract with the engineer); *John Martin Co. v. Morse/Diesel, Inc.*, 819 S.W.2d 428 (Tenn. 1991) (subcontractor allowed to pursue claim for negligence against construction manager despite the fact there was no contract between the two).

**Eichleay Formula.** The Eichleay formula is commonly used to measure the amount of damages recoverable for extended home office overhead in a suspension of work or delay claim asserted by a contractor. The formula is named
after a federal government contract case, *Appeal of Eichleay Corp.*, 60-2 B.C.A. (CCH) ¶ 2688, 1960 WL 538 (ASBCA 1960), which recognized the use of this formula to measure damages in a federal government contract case, although previous cases had also employed the same formula. See, e.g., *Fred R. Comb Co. v. United States*, 103 Ct. Cl. 174, 181, 183–84 (1945); *Houston Ready-Cut House Co. v. United States*, 119 Ct. Cl. 120, 172–73, 192–93 (1951).

The courts have recognized that a contractor needs to recover its home office overhead by allocating these costs to the various contracts that the contractor has, even though these costs are not directly attributable to a particular contract.

Suspension or delay of contract performance results in interruption or reduction of the contractor’s stream of income from payments for direct costs incurred. This in turn causes an interruption or reduction in payments for overhead, derived as a percentage of direct costs, which is set by the contract. Home office overhead costs continue to accrue during such periods, however, regardless of direct contract activity. Consequently, this decrease in payments for direct costs creates unabsorbed overhead, unless home office workers are laid off or given additional work during such suspension or delay periods. When the period of delay is uncertain and the contractor is required by the government to remain ready to resume performance on short notice (referred to as “standby”), the contractor is effectively prohibited from making reductions in home office staff or facilities or by taking on additional work.

*Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1577–78 (Fed. Cir. 1994). “The Armed Services Board of Contract Appeals devised the *Eichleay* formula to provide a fair method for allocating home office overhead costs, otherwise inallocable, to specific contracts.” *Wickham Contracting Co.*, 12 F.3d at 1578.

The formula is as follows:

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<tr>
<th>Formula</th>
<th>Description</th>
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<tr>
<td>(1)</td>
<td>Total contract billing/ Total billings for contract period  ×  Total home office overhead for contract period  =  Overhead allocable to the contract</td>
</tr>
<tr>
<td>(2)</td>
<td>Allocable overhead/ Days of performance  =  Daily contract overhead</td>
</tr>
<tr>
<td>(3)</td>
<td>Daily contract overhead  ×  No. days delay  =  Amount claimed</td>
</tr>
</tbody>
</table>

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First, the formula calculates the amount of the claimant’s overhead that would have been allocated to the contract had there been no delay. Second, the formula calculates what the daily allocation of overhead to the contract would have been had there been no delay. Third, the formula multiplies the daily overhead calculation by the number of days of delay in order to calculate the amount of the claim for extended home office overhead due to the delay. “The Eichleay formula estimates unabsorbed overhead by determining a daily overhead dollar amount for a particular contract and multiplying that amount by the number of days of delay.” Mech-Con Corp. v. West, 61 F.3d 883, 886 (Fed. Cir. 1995).

Generally, in order to use the Eichleay formula, a contractor must prove that it was required to be on standby for the duration of the delay and could not obtain replacement work. “[A] contractor must show: (1) a government-imposed delay; (2) that the contractor was on ‘standby’; and (3) that the contractor was unable to take on other work.” Mech-Con Corp., 61 F.3d at 886. See also 6 Phillip L. Bruner & Patrick J. O’Connor, Jr., Bruner and O’Connor on Construction Law § 19:85 (2002 & Supp. 2009). Many federal and state courts have recognized the use of the Eichleay formula, although there has also been some criticism and some disfavored “modified” Eichleay formulae. See 6 Phillip L. Bruner & Patrick J. O’Connor, Jr., Bruner and O’Connor on Construction Law § 19:85 (2002 & Supp. 2009).

Employer. In the United States, the term “employer” means the party that employs workers. In the international construction contracting context, the term means the party that “employs” or contracts with the contractor or the engineer—in other words, the project owner. Wendy Kennedy Venoit et al., International Construction Law 71 n.1 (ABA 2009).

Employer’s Liability Insurance. A workers’ compensation policy includes employer’s liability insurance. Coverage A or Part One of the workers’ compensation policy provides the coverage to protect the insured from liability under the applicable workers’ compensation laws. Coverage B or Part Two of the workers’ compensation policy is the employer’s liability insurance. Employer’s liability insurance provides coverage for employment-related bodily injury or disease not covered by workers’ compensation laws. A claim that might be covered by the employer’s liability insurance is a claim by an employee for a disease that at least in part arose out of the employment but does not come within the definition of occupational disease in the applicable workers’ compensation law. Another example might be a claim where an employee of a contractor sues the project owner for an injury alleged to result from an unsafe condition on the owner’s property, and the owner then sues

**Engineer.** An engineer is a professional who provides design and other services based on the application of mathematics and engineering science. All states require engineers to be licensed in order to practice engineering, subject to exceptions, and define “engineer” and what it means to practice engineering by statute. An example is:

“Engineer” means a person who, by reason of intensive preparation in the use of mathematics, chemistry, physics, and engineering sciences, including the principles and methods of engineering analysis and design, is qualified to perform engineering work as defined in this part 1. “Engineering” means analysis or design work requiring intensive preparation and experience in the use of mathematics, chemistry, and physics and the engineering sciences.


“Practice of engineering” means the performance for others of any professional service or creative work requiring engineering education, training, and experience and the application of special knowledge of the mathematical and engineering sciences to such professional services or creative work, including consultation, investigation, evaluation, planning, design, and the observation of construction to evaluate compliance with plans and specifications in connection with the utilization of the forces, energies, and materials of nature in the development, production, and functioning of engineering processes, apparatus, machines, equipment, facilities, structures, buildings, works, or utilities, or any combination or aggregations thereof, employed in or devoted to public or private enterprise or uses.