



**Civil No. 15-1701 (GAG)**

1 Plaintiff seek relief asking the Court for compensatory damages in no less than a million dollars  
2 and attorneys' fees and costs. (Docket No. 1)

3 Defendant moves to dismiss this action, under FED. R. CIV. P. 12(b)(1), for lack of subject-  
4 matter jurisdiction given that Plaintiffs failed to comply with several FTCA requirements. (Docket  
5 No. 12) Plaintiffs have opposed the motion. (Docket No. 17) After reviewing the parties'  
6 submissions and the pertinent law, the court **GRANTS** Defendant's motion to dismiss. (Docket  
7 No. 12)

8 **I. Standard of Review**

9 Pursuant to FED. R. CIV. P. 12(b)(1), a defendant may move to dismiss an action for lack of  
10 subject-matter jurisdiction. "This rule is a large umbrella, overspreading a variety of different  
11 types of challenges to subject-matter jurisdiction. Some challenges—those grounded in  
12 considerations of ripeness, mootness, sovereign immunity, and the existence of federal question  
13 jurisdiction are good examples." Valentin v. Hospital Bella Vista, 254 F.3d 358, 362-363 (1st Cir.  
14 2001). As courts of limited jurisdiction, the Federal Courts must construe their jurisdictional  
15 grants narrowly. Therefore, a party that seeks the jurisdiction of the Federal Courts carries the  
16 burden of demonstrating its existence. Viqueira v. First Bank 140 F.3d 12, 16 (1st Cir. 1998).  
17 When deciding whether to dismiss a complaint for lack of subject-matter jurisdiction, the Court  
18 "may consider whatever evidence has been submitted." Aversa v. United States, 99 F.3d 1200,  
19 1210 (1st Cir. 1996); Torres v. Bella Vista Hosp., Inc. 523 F. Supp. 2d 123, 132 (D.P.R. 2007).  
20 Motions brought under Rule 12(b)(1) are subject to the same standard of review as Rule 12(b)(6)  
21 motions. Negrón-Gaztambide v. Hernández-Torres, 35 F. 3d 25, 27 (1st Cir. 1994).



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1 A receipt of the claim was acknowledged by ICE in a letter sent, by regular mail and  
2 attached to an email, to the claimant’s attorney on September 8, 2014. (Docket No. 12-4.) In this  
3 letter, ICE requested proof that claimants had been appointed administrators of Elvin Osmel  
4 Rivera-Ortiz’s estate and additional documentations regarding Standard Form 95. Id. Defendant  
5 signals out that no response to that letter was ever received by ICE. (Docket No. 12 at 2-3.) On  
6 December 4, 2014 ICE denied the claim and concluded that the government is not liable for Elvin  
7 Osmel Rivera-Ortiz’s death. (Docket No. 12-5.) On May 28, 2015 Plaintiffs filed the instant  
8 action. (Docket No. 1.)

9 **III. Discussion**

10 The language of section 2401 unmistakably indicates that failure to file an administrative  
11 claim with the appropriate government agency within two years of a claim’s accrual results in that  
12 claim being “forever barred.” 28 U.S.C. § 2401(b). It is well-settled First Circuit precedent that  
13 the timely filing of an administrative claim is a jurisdictional pre-requisite to file suit under FTCA.  
14 See González v. United States, 284 F.3d 281, 287 (1st Cir. 2002). Furthermore, in administrative  
15 law, a claimant who has failed to receive a final decision from the pertinent administrative agency  
16 may not obtain judicial review. See Sims v. Apfel, 530 U.S. 103, 106-07 (2000). Plaintiffs allege  
17 that under FTCA, and in violation of Puerto Rico’s Civil Code. P.R. LAWS ANN. tit. 31, § 5141-  
18 5142, the United States should be held responsible for the wrongful death of Elvin Osmel Rivera-  
19 Ortiz. (Docket No. 1 ¶ 11.) Essentially, Plaintiffs claim that on July 27, 2012 ICE agents, acting  
20 under the laws, regulations, customs of the U.S. Federal Government, negligently shot and killed  
21 Elvin Osmel Rivera-Ortiz. (Docket No. 1 ¶¶ 6; 8.) They also contend that superiors of the ICE  
22 agents involved failed to supervise their subordinates and thereby allowed them to make  
23 inappropriate use of their weapons. (Docket No. 1 ¶¶ 9-10.) Defendant, in turn, moves to dismiss  
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1 Plaintiffs claim for failure to comply with the requirements of the FTCA. (Docket No. 12 at 1-2.)  
2 They put forward that Plaintiffs failed to file a timely administrative claims within two years of the  
3 date of the incident, did not provide a reason to toll the statute of limitations, and thus failed to  
4 exhaust administrative remedies as required by the FTCA. (Id. at 3-7.)

5 In their motion to dismiss, Defendant presented the USPS tracking record as proof of the  
6 untimely submission of the administrative claim. The certified mail was delivered on August 1,  
7 2014 and the statute of limitations had expired on July 28, 2014.<sup>4</sup> The FTCA strictly bars any tort  
8 claim filed against the United States unless it is presented “within *two years after such claim*  
9 *accrues.*” 28 U.S.C. § 2401(b) (emphasis added), and a FTCA claim generally accrues at the time  
10 of injury. Donahue v. United States, 634 F.3d 615, 623 (1st Cir. 2011). This limitation provision  
11 seeks to ensure that “the government is promptly presented with a claim while the evidence is still  
12 fresh [and it] is to be strictly construed in the government’s favor.” Patterson v. United States, 451  
13 F.3d 268, 270 (1st Cir. 2006) (citing United States v. Kubrick, 444 U.S. 111, 117–18 (1979)).  
14 Additionally, for purposes of the FTCA’s statute of limitation, the critical date is when claims are  
15 *received* by an administrative agency, and not the date in which the claims are *mailed*. 28 C.F.R. §  
16 14.2(a); see also García v. United States, No. 09-1674 (SEC), 2010 WL 4452585, at \*1 (D.P.R.  
17 Nov. 5, 2010). Although this filing is a non-waivable jurisdictional requirement, González, 284  
18 F.3d at 288 (1st Cir. 2002), the statutory time limit is subject to equitable tolling. See Sánchez v.  
19 United States, 740 F.3d 47, 54 (1st Cir. 2014), cert. denied, 135 S. Ct. 54 (2014) (citing Ramírez–  
20 Carlo v. United States, 496 F.3d 41, 48-49 & n. 3 (1st Cir. 2007)). However, equitable tolling is  
21 applied “only sparingly,” Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1990), and the  
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23 <sup>4</sup> The injury date was on Sunday July 27, 2012 hence the term was extended to the 28th.  
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1 burden of persuasion falls on the party seeking its application. See I.V. Servs. of Am., Inc. v. Inn  
2 Dev. & Mgmt., Inc., 182 F.3d 51, 54 (1st Cir. 1999).

3 FTCA requirements are straightforward: (1) plaintiffs have two years from the time of  
4 accrual to file a claim with the appropriate agency, and then (2) if the claim is denied, six months  
5 after the denial, by certified or registered mail, to file suit. See Dominguez v. United States, 799  
6 F.3d 151, 153 (1st Cir. 2015). Plaintiffs opposed the motion to dismiss on two grounds. First,  
7 they argue that the United States cannot contradict its own acts and suggest that if ICE deemed the  
8 claim to be timely, then it cannot be challenged at this stage of the proceedings. (Docket No. 17.)  
9 Otherwise, ICE would have not accepted the administrative claim. (Id.)

10 These propositions' deductive reasoning is completely flawed. ICE's administrative  
11 determination represents only one of several above-mentioned FTCA requirements that must be  
12 completed in order to file suit. All requirements must be met. 28 U.S.C. § 2401(b). Even if the  
13 ICE did not consider the timeliness of the claim, it can now be challenged for jurisdictional  
14 purposes because it is a pre-requisite for filing suit under FTCA. See González, 284 F.3d at 288  
15 (1st Cir. 2002) (citing Coska v. United States, 114 F.3d 319, 323 n. 8 (1st Cir. 1997)). Plaintiff's  
16 final assertion, which states "[i]f the claim had been untimely, the agency would have not accepted  
17 it" (Docket No. 17), is then based on a false premise not logically related to the conclusion.  
18 Consequently, Plaintiffs have the burden to prove that the administrative claim was timely filed  
19 and failure to do so requires the dismissal of the complaint. See Ruiz-Duclos v. United States, No.  
20 12-1321 (JAG), 2013 WL 1386297, at \*2-3 (D.P.R. Mar. 28, 2013).

21 Plaintiffs' second argument attempts precisely to prove the timeliness of the claim's filing.  
22 They argue that the claim was properly mailed and delivered on time by July 28, 2014, in spite that  
23 it was not accepted until August, 1 2014. This argument likewise fails as mailing of the claim

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1 alone “is insufficient to meet the requirement that the claim be timely presented.” Sánchez v.  
2 United States, 134 F. Supp. 2d 211, 215 (D.P.R. 2001) (citing Drazan v. United States, 762 F.2d  
3 56, 58 (7th Cir. 1985)). As discussed above, the letter of the law is clear: “a claim shall be deemed  
4 to have been presented when a Federal agency *receives* from the claimant . . . written notification  
5 of the incident.” 28 C.F.R. § 14.2(a) (emphasis added).

6 The Court need not address Defendant’s equitable tolling argument because the burden of  
7 persuasion falls on the party seeking its application. I.V. Servs. of Am., Inc., 182 F.3d at 54 (1st  
8 Cir. 1999). Plaintiffs did not provide any argument for tolling FTCA two-year statutory limit. In  
9 light of the aforementioned reasoning, the undersigned concludes that Plaintiffs’ administrative  
10 claim was untimely. Consequently, Plaintiffs also failed to exhaust administrative remedies. Thus,  
11 the Court does not have jurisdiction over the tort claim against the United States. Richman v.  
12 United States, 709 F.2d 122, 124 (1st Cir. 1983).

13 **IV. Conclusion**

14 The court **GRANTS** Defendant’s motion to dismiss and **DISMISSES** Plaintiffs’ claims.

15 **SO ORDERED.**

16 In San Juan, Puerto Rico this 26th day of August, 2016.

17 *s/ Gustavo A. Gelpí*  
18 GUSTAVO A. GELPI  
United States District Judge