

looking car with a maximum speed of 35 miles per hour.⁷ Consumers expect cars to be able to reach highway speeds, and thus the dealer must disclose to the buyer that the car does not meet that ordinary expectation.

In such cases, an omission is misleading under the FTC Act if the consumers' ordinary fundamental expectations about the product were violated. Mere annoyances that leave the product reasonably fit for its intended use do not meet this threshold.⁸ Thus, a dealer's failure to disclose that some might find a car's seatbelt warning to be annoyingly loud would not be a deceptive omission because consumers have no ordinary expectations about car seatbelt warnings that would mislead them absent a disclosure.

As *International Harvester* sets out at length, a deceptive omission is distinct from an unfair failure to warn or other forms of unfair omissions.⁹ The FTC has brought such cases under its unfairness authority where it has met the statutorily mandated higher burden of showing that the conduct causes or is likely to cause substantial consumer injury that is not reasonably avoidable by the consumer and is not outweighed by benefits to consumers or competition.¹⁰

Turning to the case at hand, the complaint alleges that VisualDiscovery advertising software on Lenovo laptops acted as a man-in-the-middle between consumers and the websites they visited. As such, the software had access to all secure and unsecure consumer-website communications and rendered useless a critical security feature of the laptops' web browsers. Such practices introduced gross hazards inconsistent with ordinary consumer expectations about the minimum performance standards of software. As a result, the man-in-the-middle functionality and the problems it generated made VisualDiscovery unfit for its intended use as software. Thus, Count I properly alleges that Lenovo failed to disclose, or disclose adequately, that VisualDiscovery acted as a man-in-the-middle.¹¹

Although Commissioner McSweeney and I both support Count I, she would add allegations that Lenovo failed to disclose that VisualDiscovery injected ads into shopping websites and slowed web browsing. She argues that the injected ads and slowed web browsing altered the internet

extent ordinary consumers expect anything from advertising software, they likely expect it to affect their web browsing and to be intrusive, as the popularity of ad blocking technology shows. In addition, unlike the man-in-the-middle technique, VisualDiscovery's ad placement and web browsing effects did not introduce gross hazards obviously outside of consumers' ordinary expectations for advertising software. In short, although VisualDiscovery's ad placement and
