Lewis and Miles

Regardless of whether the potential concern from a merger is coordinated effects or unilateral effects and regardless of whether the products involved are homogeneous or differentiated, the Merger Guidelines provide a rebuttable presumption of unlawfulness if the level of post-merger concentration and the increase in concentration exceed certain thresholds. And courts continually rely on this presumption in provider (and health-plan) mergers, even though they involve differentiated products and the primary, if not sole, concern is the potential for unilateral effects. What, if anything, is the connection between market concentration and the likelihood of unilateral effects in differentiated products mergers? Why is high concentration predictive of unilateral effects? Is the presumption justified or should it be abandoned?

The Merger Guidelines provide that the efficiencies from a merger may offset its likely anticompetitive effects. Speeches and articles by FTC officials state the same. Yet the agencies and courts continue to emphasize that there is no appellate decision in which the efficiencies from a transaction sufficiently rebutted a prima facie case, suggesting that an efficiencies argument will never carry the day. And in every hospital merger and physician merger decision since at least 2007, the FTC and the courts have assessed efficiency arguments quite harshly. Are the agencies and courts providing efficiencies arguments sufficient credibility? Are the standards that efficiencies arguments must meet too demanding, particularly given the ease of the government's proving a prima facie case based on market share and concentration? Are the time and money necessary to prove an efficiencies argument worthwhile?